A DIGEST OF INDIAN LAW CASES;

CONTAINING

HIGH COURT REPORTS,

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA, 1906.

WITH AN INDEX OF CASES;

BEING A SUPPLEMENT TO MR. J. V. WOODMAN'S CONSOLIDATED DIGEST OF INDIAN LAW CASES, 1836-1900.

COMPILED, UNDER THE ORDERS OF THE GOVERNMENT OF INDIA,

BY

C. E. GREY, B.A. (OXON.),

BARRISTER-AT-LAW AND EDITOR OF THE INDIAN LAW REPORTS.

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PREFACE.

THIS volume is published as a further supplement to Mr. J. V. Woodman's Consolidated Digest of Indian Law Cases, 1836-1900. It contains the cases published for the year 1906 in the Indian Law Reports Series, the Law Reports (Indian Appeals) and the Calcutta Weekly Notes.

The headings and sub-headings under which the subject-matter of the Digest is arranged are printed in capitals and in black type, the sub-headings being in small capitals. The cross-references are printed in ordinary type.

C. E. GREY.

CALCUTTA;
The 1st August, 1908.

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ANNUAL DIGEST

OF

THE HIGH COURT REPORTS

AND OF

THE PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA,

1906.

A

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See LANDLORD AND TENANT.
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——— *Cesses—Puja kharach—Road and Public Works Cesses—Bengal Tenancy Act (VIII of 1885), s. 74—Interest—Miscellaneous cases—Arrears of rent—Contract subsequent to the passing of the Act—Bengal Tenancy Act (VIII of 1885), ss. 67, 178 (3), cl. h (1).*—Where by the terms of the kabuliat a tenant agreed to pay, in excess of the rent, Road and Public Works cesses at the rate of one anna per rupee and puja kharach at the rate of half anna per rupee according to the kist of rent. *Held*, that the puja kharach was an abwab, but that the cesses would not come within the definition of an abwab in s. 74 of the Bengal Tenancy Act, and the contract to pay more than the proportion payable by the tenant under the Road Cess Act was legal. *Surnomoyee Dabee* v. *Koomar Purresh Narain Roy, I. L. R. 4 Calc. 576*, referred to. S. 178 (3), cl. (*h*) of the Bengal Tenancy Act is applicable to a contract entered into after the passing of the Act, namely, the 14th March 1885, and the parties would not be competent to contract themselves out of the provision in s. 67, which limits the interest to simple interest at 12 per cent. per annum by the device of making the rent payable otherwise than quarterly, and such a contract would not be enforceable in so far as it may provide for payment of interest at a rate higher than 12 per cent. *Hemanta Kumari Debi* v. *Jagadindra Nath Roy, I. L. R. 22 Calc. 214*: *L. R. 21 I. A. 131*, explained. NARENDRA KUMAR GHOSH *v.* GORA CHAND PODDAR (1906).
I. L. R. 33 Calc. 683

ACCOMPLICE.

See CRIMINAL PROCEDURE CODE.
See PARDON . **I. L. R. 33 Calc. 1353**

ACCOMPLICE—*concluded.*

——— *Evidence of an accomplice—Compulsory payment of bribe—Corroboration, amount of—Witnesses present at the time of payment of bribe.*—Where the complainant did not willingly offer the bribe, but the accused, a police officer, demanded it before taking up the charge lodged by the complainant and made use of his official position to enforce his demand. *Held*, the circumstances were such as would justify a conviction on the testimony of accomplices with a much slighter degree of corroboration than would be the case, if the accomplices were entirely voluntary accomplices. *Akhoy Kumar Chuckerbutty* v. *Jagat Chunder Chuckerbutty, I. L. R. 27 Calc. 925*, approved of; *Emperor* v. *Malhar Martand Kulkarni, I. L. R. 26 Bom. 193*, referred to. *Held*, also, that those who lent money to the complainant and those who were present, when money was paid to the accused, could not be said to be accomplices, unless they had co-operated in the payment of the bribe or were instrumental in the negotiations for its payment. *Queen-Empress* v. *Deodhar Sing, I. L. R. 27 Calc. 144*, approved of. *Queen* v. *Chando Chandalinee, 24 W. R. 55*, distinguished. DEO NANDAN PERSHAD *v.* EMPEROR (1906) . . . **I. L. R. 33 Calc. 649**

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See CONTRACT.

——— *Contract—Construction—Custom of trade in Bombay—Vendor and purchaser—Principal and agent—Goods ordered nett free godown—No remuneration fixed—Variance between printed and written terms.*—*Held*, also, that according to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe, at a fixed price, nett free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with

ACCOUNT—*concluded.*

or without the knowledge of the merchant. PAUL BEIER v. CHOTALAL (1904) I. L. R. 30 Bom. 1

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——— *Notice to accused person necessary before order in his favour can be set aside.*—An order by a Magistrate directing payment of compensation to the accused ought not to be set aside on appeal without notice to the accused. It will also be safer to give notice to the officer appointed by the Local Government referred to in s. 422 of the Code of Criminal Procedure. EMPEROR v. PALANIAPPAVELAN (1905) . . . . . I. L. R. 29 Mad. 187

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See LEGAL PRACTITIONERS ACT.

——— **1879—XXI.**

See FOREIGN JURISDICTION AND EXTRADITION ACT.

ACT—*concluded.*

——— **1881—V.**

See PROBATE AND ADMINISTRATION ACT.

——— **1881 - XXVI.**

See NEGOTIABLE INSTRUMENTS ACT.

——— **1882—II.**

See TRUSTS ACT.

——— **1882—IV.**

See TRANSFER OF PROPERTY ACT.

——— **1882—V.**

See EASEMENTS ACT.

——— **1882—VI.**

See COMPANIES ACT.

——— **1882—X.**

See CRIMINAL PROCEDURE CODE.

——— **1882—XIV.**

See CIVIL PROCEDURE CODE.

——— **1885—VIII.**

See BENGAL TENANCY ACT.

——— **1887—IX.**

See PROVINCIAL SMALL CAUSE COURT ACT.

——— **1887—XII.**

See CIVIL COURTS ACT.

——— **1888—V.**

See INVENTIONS AND DESIGNS ACT.

——— **1889—IV.**

See MERCHANDISE MARKS ACT.

——— **1890—VIII.**

See GUARDIANS AND WARDS ACT.

——— **1895—I.**

See PRESIDENCY TOWNS SMALL CAUSE COURTS ACT.

——— **1898—V.**

See CRIMINAL PROCEDURE CODE.

——— **1899—IX.**

See ARBITRATION ACT.

ACT OF STATE.

See NATIVE STATES . **10 C. W. N. 361**

ACTIONABLE CLAIM.

See ASSIGNMENT.

See CONTRACT ACT.

ADEN.

——— **Court of Resident at.**

See LETTERS PATENT FOR BOMBAY, CL. 13.

See TRANSFER OF SUIT.

I. L. R. 30 Bom. 246

ADMINISTRATION.

See EVIDENCE ACT, S. 44.

10 C. W. N. 422

See LETTERS OF ADMINISTRATION.

10 C. W. N. 432

ADMINISTRATION BOND.

See GUARDIAN AND WARDS ACT, SS. 34, 35, 36, 37.

——— *Administrator-General—Suit—Fraud—Misrepresentation—Mistake—Administration—Sureties, liability of—Assignment—Registrar—Administrator-General's Act (II of 1874), s 33—Succession Act (X of 1865), ss. 242, 257, 269—Contract Act (IX of 1872), ss. 20, 142, 143.*—The Administrator-General of Bengal, as administrator with the will annexed to the estate of *B*, sued *X*, the former administrator of *B*'s estate, and also *Y* and *Z*, the sureties under a bond executed by *X*, *Y* and *Z*, to recover the sale proceeds of certain bank shares and cash, which *X* had misappropriated to his own use. *Y* and *Z* contended that they were not liable, as it was upon the representations of *X* that they signed the bond, and upon it being subsequently found that such representations were false and that there had been a mistake of fact essential to the agreement, they were relieved from any responsibility as sureties and they further stated that the Court had no power to assign the bond to the Administrator-General. *Held*, (HARINGTON and STEPHEN, *JJ.*, dissenting), that the sureties *Y* and *Z* were liable for the sale-proceeds of the bank shares fraudulently misappropriated by *X*. *Per* MACLEAN, *C J.*—Under s. 257 of the Succession Act the Court has power to authorize the Registrar of the High Court to assign an administration bond to the Administrator-General, on the Court being satisfied that the engagement of such bond has not been kept. The Administrator-General is a person, and the fact that at his death all assets vest in his successor in office under s. 33 of the Administrator-General's Act as opposed to vesting in his executors or administrators, is not sufficient to debar him from accepting an assignment. Under s. 256 of the Succession Act a surety bond must be given to the Judge of the District Court. In the High Court such bonds must be taken out in the name of the Chief Justice. The grant of letters of administration to *X* was void *ab initio*. *Abram* v. *Cunningham*, 2 *Lev.* 182; *Ellis* v. *Ellis*, 1 *Ch.* 613, referred to. The sureties guaranteed the honesty of *X* in dealing with the estate of *B*, and that being so the bond was not void and the Administrator-General can sue upon it. *Per* HARINGTON and STEPHEN, *JJ.*—The sureties are not liable under the contract, because

ADMINISTRATION BOND—*concluded.*

they and also the Court were under a mistake of fact essential to the agreement, which was the authority of *X* as attorney of the next of kin to apply for and receive the grant of letters of administration, and but for that mistake the Court could not have granted letters of administration to *X*, nor have taken a bond from the sureties. The contract of suretyship was void *ab initio* by reason of the fraud against which the sureties did not give a guarantee, and s. 20 of the Contract Act applied. *Lester* v. *Gooch, 17 W. R. Eng. 137*, distinguished. *The Mayor of Kingston-on-Hull* v. *Harding, 2 P. B. 494*, referred to. *Per* MITRA, *J.*—The liabilities of the sureties did not depend upon the validity of the grant of letters of administration to *X*, but arose under the covenants in the administration bond. *Harris* v. *Huntback, I Burr. 373*; *Kasheba* v. *Shrysat Narshid, I. L. R. 19 Bom. 697*, referred to. Neither the invalidity of the grant of letters of administration, nor the mistake of the Court in accepting the bond are sufficient to discharge the sureties. It was the wrongful acts of *X* that caused a present loss to the estate, and the sureties were bound to make good the loss. Neither s. 20 of the Contract Act nor ss. 242, 260 of the Succession Act applied. *Per* GEIDT, *J.*—There was no mistake as to a matter of fact essential to the agreement, and there is nothing in law to indicate that sureties are entitled to evade their contract of guarantee, because of a mistake induced by the principal debtor. It would be a novel and dangerous doctrine to hold that an administration bond is invalidated by the fact that the sureties themselves had been deceived by the very person, for whose honesty they vouch. DEBENDRA NATH DUTT AND BANKU BEHARY BANERJEE *v.* ADMINISTRATOR-GENERAL OF BENGAL (1906).

I. L. R. 33 Calc. 713
s.c. 10 C. W. N. 673

ADMINISTRATOR-GENERAL.

See ADMINISTRATION BOND.

ADMINISTRATOR-GENERAL'S ACT (II OF 1874).

See ADMINISTRATION BOND.

See LEGAL PRACTITIONERS ACT.

See LIMITATION.

I. L. R. 30 Bom. 11

See POSSESSION.

I. L. R. 33 Calc. 1015

——— s. 17—*Probate and Administration Act (V of 1881), ss. 31 and 32—Administrator-General taking possession without prior order of Court—Conflict between Administrator-General and Court of Wards—Nominee of Court of Wards, if can be appointed administrator—Zemindaris.*—The Court of Wards, as such, cannot be appointed Administrator. There is nothing, however, to prevent this Court, in certain circumstances, *e.g.*, in this case where the testator wished the minor's estate to be entrusted to the Court of Wards, from appointing

ADMINISTRATOR-GENERAL'S ACT (II OF 1874)—*concluded.*

the nominee of the Court of Wards (in most instances the manager) Administrator of the testator's estate with the Will annexed under s. 31 of the Probate and Administration Act. *Held*, on the facts of this case, that the Administrator-General's taking possession of the estate of the testator was illegal. IN THE GOODS OF TROYLUCKO NATH BISWAS (1905).

10 C. W. N. 241

ADMINISTRATOR PENDENTE LITE.

——— *Final decree—Administrator pendente lite, position of—Termination of lis—Executor de son tort—Principles, if applicable to Hindus.*—The functions of an Administrator *pendente lite* terminate on the pronouncement of the final decree. RADHIKA MOHON ROY *v.* BONNERJEE (1905) . . . 10 C. W. N. 566

ADOPTION.

See HINDU LAW.

See WAJIB-UL-ARZ.

ADVERSE POSSESSION.

——— by lessee under invalid lease.

See DEBUTTER . 10 C. W. N. 738

See MORTGAGE . 10 C. W. N. 906

——— *Adverse possession against tenant, where adverse to landlord—Tenant holding over when dispossessed—Right of landlord to sue trespasser—Limitation.*—When there is a current lease, and the tenant is dispossessed by a third party, time does not commence to run against the landlord, until the expiration of the lease. *Krishna Gobind Dhur* v. *Hari Churn Dhur, I. L. R. 9 Calc. 367*, and *Sarat Sundari* v. *Bhoba Pershad, I. L. R. 13 Calc. 101*, followed. But when the lease has expired and the tenant is holding over with the landlord's consent, and the possession of such third party is adequate in continuity, in publicity and in extent so as to show that it is possession adverse to the landlord, the latter is not precluded from determining the tenancy and suing the trespasser in ejectment, and his right to sue will be barred after 12 years of such possession. *Radhamoni Daby* v. *The Collector of Khulna, 4 C.W. N. 507*, referred to. KISHWAR NATH SAHI DEV *v.* KALI SANKAR SHAHI (1905) . . 10 C. W. N. 343

——— *Burden of proof—Title—Suit for possession of alluvial land.*—When a suit for possession is made by a plea of adverse possession during the limitation period, the question of limitation becomes a question of title and the plaintiff must first furnish *primâ facie* proof of subsisting title at the date of the commencement of his suit before the defendant is required to establish his adverse possession. *Jafar Husain* v. *Mashuq Ali, I. L. R. 14 All. 193*, followed. Where land has been submerged proof of actual possession at the date of submersion would apparently be sufficient *primâ facie* evidence of possession during the submersion. *Secretary of State* v. *Krishnamoni*

ADVERSE POSSESSION—*concluded.*

Gupta, I. L. R. 29 Calc. 575. MAZHAR HUSAIN *v.* BIHARI SINGH (1906) . **I. L. R. 28 All. 760**

ADVOCATE.

———— *Professional misconduct—Hindu Law —Agreement—Compromise.*—In proceedings for administration of the estate of a Hindu, who died intestate, the appellant, an Advocate in the Court of the Resident in Mysore, acted as legal adviser for two groups of persons, whose succession depended on whether the property of the deceased was separate or joint: in the former case one of his clients was exclusively entitled to the whole estate; in the latter the members of both groups were entitled to divide the estate equally. By two agreements executed on 17th May and 22nd August 1893, the persons composing the two groups bound themselves to treat the estate as joint-property and divide it accordingly: and both agreements were attested by the appellant. On 24th March 1900, the person, who would, if the estate were separate property, be exclusively entitled being then dead, letters of administration of the estate were granted to his two sons. Shortly afterwards, one of the second group of persons, relying on the agreements, sued the administrators for a share of the estate and for partition. The case of the administrators as to the agreements was that they had been entered into under mutual mistake of fact, namely, under the belief that all the parties to them were entitled to share in the estates and that there was no consideration for them. The District Judge, and on appeal the Resident, held that the estate was separate property, but the Courts differed as to the agreements, the Resident holding that the compromises embodied in them were valid and binding. Charges of professional misconduct were made against the appellant in respect of the agreements to the effect that, knowing them to be invalid, he had allowed his clients to execute them, and had even attested them himself, without warning them that they were invalid and that he knew that the father of the administrators and his sons after him were alone entitled to the estate and yet allowed those clients to give away their rights by compromises. The appellant admitted that at the time the agreements were executed he thought them to be invalid. The charges were held to be proved and the appellant was suspended from practice for four months. *Held,* that the charges could not be sustained. At the time the agreements were made and up to the decision on appeal that the property was separate it was a matter of opinion whether they were invalid or not, and they were eventually held to be valid. There was nothing to show that the appellant had any knowledge or any means of knowledge, which his clients did not possess; they were fully aware of their legal position, and were under no mistake, but deliberately accepted the compromise to avoid further litigation. *In re* LUBECK (1905) . . . . . **I. L. R. 33 Calc. 151**
s.c. 10 C. W. N. 57
L. R. 32 I. A. 217

———— *Letters Patent of the Allahabad High Court, ss. 7, 8—Rules of the Court, No. 197*

ADVOCATE—*concluded.*

—Disciplinary authority over an advocate—Libel on the Judges—Reasonable cause for suspension from practice.—Held, that the High Court at Allahabad had jurisdiction under ss. 7, 8 of its Letters Patent and the rules framed thereunder, to deal with the alleged misconduct of the appellant, a member of the English Bar, who had been admitted as an advocate of the Court, and that under s. 2 a division Court consisting of three Judges (five being then present in Allahabad) was properly constituted in that behalf. *Held,* further, that it was the intention of s. 8 to give a wide discretion to the High Court, in regard to the exercise of a disciplinary authority. It is reasonable cause for suspending an advocate from practice that he has been found guilty of contempt whilst defending, in a publication for which he was solely responsible, his misbehaviour as an advocate conducting a case before the Court by an article which was a libel reflecting on the Judges in their judicial capacity and in reference to their conduct in the discharge of their public duties. IN RE SARBADHICARY (1906) . . **L. R. 34 I. A. 41**
s.c. I. L. R. 29 All. 95

———— *Charges against an advocate—Evidence—Conviction reversed.*—The appellant, a barrister and advocate of the Chief Court of Lower Burma, was charged before the said Court with gross professional misconduct, in that (1) whilst employed as an advocate for the prosecution in an abduction case he advised the prosecutor's family to say nothing about letters having been received from his abducted daughter and designedly withheld from the police and the senior advocate for the prosecution the fact that such letters had been received; (2) that whilst the trial was proceeding and while acting as an advocate for the prosecution, he suggested or hinted to the prosecutor that he should influence or attempt to influence by improper means a certain expert witness in handwriting to give evidence favourable to the prosecution in connection with certain letters produced. He was acquitted on the first charge, but convicted on the second and dismissed from his office as an advocate of the said Court:—*Held,* on an examination of the evidence, that he must be acquitted on the second charge also. Evidence given by the said senior advocate and by the Government advocate of the prosecutor's statements to them in the absence of the appellant, even if admissible, could not avail to contradict the prosecutor's sworn denial that the appellant had advised him to bribe. Other evidence given was wholly insufficient and the improbabilities of the appellant having acted as charged were very great. BOMANJEE COWASJEE *v.* CHIEF JUDGE AND JUDGES OF THE CHIEF COURT OF LOWER BURMA (1906) . . **L. R. 34 I. A. 55**
s.c. I. L. R. 34 Calc. 129

ADVOCATE GENERAL.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882).

———— *Affidavit of document by order of the Prothonotary against Advocate General—Power of the Court—Prerogative of the Crown—Practice—High Court Rule 80a—Civil Procedure*

ADVOCATE GENERAL—*concluded.*

Code. s. 129.—The position of the Advocate General in India corresponds by statutory enactments to the position held by the Attorney General in England and there is ample authority for the view that generally speaking, the Attorney General is not called upon to make discovery on oath. An order by the Prothonotary calling upon the Advocate General to show cause why a suit instituted by him should not be dismissed for want of prosecution is not one which is within the jurisdiction of the Prothonotary to make. ADVOCATE GENERAL OF BOMBAY *v.* ADAMJI (1905) **I. L. R. 30 Bom. 474**

AFFIDAVIT.

See POWER OF ATTORNEY.
I. L. R. 33 Calc. 625

AGENCY COURTS IN KATHIAWAR.

See PRIVY COUNCIL.

AGRA AND OUDH MUNICIPALITIES ACT (I OF 1900).

———— **ss. 3 and 87**—*Municipal Board—Bye-laws—Interpretation of statutes*—Where a rule framed by a Municipal Board forbade the "erection or re-erection of any building" in the Civil station except with the previous sanction of the Board, it was *held* that such prohibition could not apply to the inclosing by means of a canvas screen of a certain space adjoining a house. KAMTA NATH *v.* MUNICIPAL BOARD OF ALLAHABAD (1905) . . . . **I. L. R. 28 All. 199**

———— **s. 49**—*Suit against a Municipal Board—Notice of suit—Whether notice necessary in the case of a suit for an injunction against an act threatened.*—*Held* by AIKMAN, *J.*, (KNOX, *J.*, *dissentiente*) that where a suit is brought against a Municipal Board to which the North-Western Provinces and Oudh Municipalities Act, 1900, is applicable to obtain an injunction prohibiting the Board from levying a tax which the Board has threatened to levy on the plaintiff, the service of such notice as is prescribed by s. 49 of the said Act is a condition precedent to the maintainability of the suit. *The Municipal Committee of Moradabad* v. *Chatri Singh, I. L. R. 1 All. 269; Manni Kasaundhan* v. *Crooke, I. L. R. 2 All. 296,* and *Brij Mohan Singh* v. *The Collector of Allahabad, I. L. R. 4 All. pp. 102 and 338,* distinguished. KNOX, *J.*—*contra.*—Where the suit is for an injunction merely, no previous notice is necessary. *Shahebzadi Shahunshah Begum* v. *Fergusson, I. L. R. 7 Calc. 499,* referred to. GREENWAY *v.* MUNICIPAL BOARD OF CAWNPORE (1906) . . **I. L. R. 28 All. 600**

———— **s. 187**—*Rules framed by Local Government for the regulation of Municipal elections—Procedure—Power to award costs—Suit to set aside order awarding costs—Jurisdiction.*—A Magistrate trying a petition to set aside the election of a member of a Municipal Board is not empowered to award costs against the unsuccessful party, and if he does so, it is competent to the party against whom costs are awarded to sue in a Civil Court to have as much of the Magistrate's order as relates to costs set aside. CHANDRA BHAN *v.* GIRWAR LAL (1906).
I. L. R. 28 All. 475

AGRA AND OUDH MUNICIPALITIES ACT (I OF 1900)—*concluded.*

AGRA LAND REVENUE ACT (XIX OF 1873).

———— **s. 113**—*Partition—Co-owners—Agreement not to partition not binding upon heirs of parties thereto—Appeal—Question of proprietary right.*—*Held,* that an agreement amongst the members of a family holding property jointly that the family property should not be partitioned could not bind the property in the hands of the descendants of the parties to such an agreement; also that the question whether such an agreement could be binding on the property in the hands of the descendants of the parties thereto was a question of proprietary right within the meaning of s. 113 of Act XIX of 1873, and an appeal would, therefore, lie from the finding thereon. ABU MUHAMMAD KHAN *v.* KANIZ FIZZA (1905).
I. L. R. 28 All. 185

———— **ss. 113, 114, 241 (*f*)**—*Partition—Question of title raised before and decided by Assistant Collector—Appeal to wrong Court—Suit in Civil Court for declaration of title—Jurisdiction.*—In an application for partition before an Assistant Collector certain parties raised an objection that they were exclusively entitled to a portion of the land sought to be partitioned. The Assistant Collector tried the question of title so raised under s. 113 of the North-Western Provinces Land Revenue Act, 1873, and decided it in favour of the objectors. The applicants appealed to the Collector, who entertained the appeal and reversed the finding of the Assistant Collector, and this decision was upheld by the Commissioner and the Board of Revenue. Before the partition proceedings were completed, the unsuccessful objectors filed a suit in the Civil Court praying for a declaration that the lands in question were their exclusive property and, if necessary, for a decree for possession. *Held,* that the suit was maintainable. No appeal lay on the revenue side from the Assistant Collector's order on the plaintiffs' objection, which was now final; and, inasmuch as the suit had been instituted before the completion of the partition proceedings, it was not obnoxious to the prohibition contained in s. 241 (*f*) of Act XIX of 1873. *Muhammad Sadiq* v. *Laute Ram, I. L. R. 23 All. 291,* referred to. MUHAMMAD JAN *v.* SADANAND PANDE (1906) . . **I. L. R. 28 All. 394**

AGRA RENT ACT (XII OF 1881).

———— **s. 35**—*Decree for rent—Execution of decree—Application to eject tenant—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 179—Agra Tenancy Act (II of 1901), s. 175 et seqq.—Appeal.*—A land-holder obtained under Act XII of 1881, s. 35, a decree for arrears of rent against

AGRA RENT ACT (XII OF 1881)— *concluded.*

certain tenants. The decree-holder did not attempt to execute this decree against the tenants, until more than three years had elapsed from the date thereof; but meanwhile she did apply for and obtained the ejectment of the tenants. *Held*, that execution of the decree was barred, and that the decree-holder's application for ejectment could not operate to save limitation. *Sed quære* whether any appeal lay from the order of the first Court (Assistant Collector) disallowing execution. *Kharag Singh* v. *Pola Ram, I. L. R. 27 All. 31*, doubted. MAHARANI OF DUMRAON v. BUDDHA KURMI (1905).
I. L. R. 28 All. 131

AGRA TENANCY ACT (II OF 1901).

——— **ss. 8, 20 and 22**—*Fixed rate tenant—Transfer—Succession—Claim of sister to inherit.*—A transferee from a zamindar under a deed which purports to confer all the rights of a tenant at fixed rates, acquires only rights of an occupancy tenant, and not those of a fixed rate tenant as defined in s. 8 of the Tenancy Act. The fixed rate tenant referred to in s. 20 of the Tenancy Act is a tenant described in s. 8 of that Act, and not a tenant who, under a contract with the zamindar, holds at a fixed rate of rent. The interest of such transferee cannot, under s. 22 of the Tenancy Act, devolve upon his sister. BACHCHI v. BACHCHI (1906) . . . . . **I. L. R. 28 All. 747**

——— **s. 20**—*Statute 24 and 25 Vict., Ch. CLIV—Occupancy holding—Sale in execution of Civil Court decree—Subsequent relinquishment of holding by tenant in favour of landlord.*—A in execution of a decree for maintenance got the occupancy holding of her husband sold, purchased it herself, and afterwards sold it to the defendant. Subsequently the husband relinquished the holding to the plaintiff, his landlord. *Held*, that the fact that the relinquishment by the husband may have been intended to defeat the defendant's claim did not prevent the defendant's claim being absolutely barred by the provisions of s. 20 of the Agra Tenancy Act, 1901. *Jagoe* v. *Harrington, 10 L. R. Ireland 335; Donoughmore* v. *Forest, Ir. Rep. 5 Com. L. 443 (Exch. C.), Gilman* v. *Murphy Ir. Rep. 6 Com. L. 34*, referred to. MADAN LAL v. ALI NASIR KHAN (1905) . **I. L. R. 28 All. 696**

——— **ss. 56, 57 (a) and (c) and 80**—*Landholder and tenant—Ejectment—Construction of document—Lease—Condition inconsistent with the provisions of the Tenancy Act.*—The plaintiff leased a village to the defendant. The defendant executed a *kabuliat* containing, amongst other provisions, a covenant for payment of the rent, amounting to R7,050, half in the month of Kartik and half in the month of Baisakh, as also, in the event of the revenue of the village being enhanced, enhanced rent to the extent of the increase in the revenue. The lessee also covenanted to plant 10 bighas *kham* per plough with indigo and to transmit the indigo to the plaintiff every year and also to render in kind other produce. The *kabuliat* further contained a provision that the lessee should not allow any tenant to acquire occupancy rights, and that on failure to observe this provision he should pay to the lessor R50 per plough as enhanced rent during the term of the lease. There was a further provision that, if the lessee failed to comply with the conditions of the lease, the plaintiff should have the power to dispossess him during the term of the lease. On failure of the lessee to observe the conditions above set forth the lessor sued for and obtained a decree for his ejectment. *Held*, that the condition of forfeiture for non-payment of rent was inconsistent with the provisions of the Agra Tenancy Act, 1901, and the plaintiff was not entitled to maintain his suit for ejectment. But, inasmuch as the lease would expire by effluxion of time within a year from the date of the High Court's judgment, the lessee was not under s. 80 of the Act entitled to be restored to possession. TARA SINGH v. KHUSHHAL KUNWAR (1906) . . . . . **I. L. R. 28 All. 610**

AGRA TENANCY ACT (II OF 1901)— *concluded.*

——— **s. 63**—*Effect of tenant acquiring a share in the village.*—A tenant who, during the period of his occupancy, acquires a share in the proprietorship of a village, retains nevertheless the status of a tenant in respect of his holding and is subject to all the incidents of his tenancy. *Kakhan-ud-din Khan* v. *Bhogi Tewari, S. A. 739 of 1889*, followed. ABUL HASAN KHAN v. BHURA (1906).
I. L. R. 28 All. 763

——— **ss. 83** *et seqq.*—*Land-holder and tenant—Surrender by tenant of his holding—Notice.*—Before a valid notice of surrender of his holding can be served on a land-holder through the Tahsildar under the provisions of s. 85 of the Agra Tenancy Act, 1901, it is a condition precedent that the tenant should have himself given notice under s. 83 or s. 84 and that the land-holder should have refused to receive such notice. SUMERA v. PIARE LAL (1906) . . **I. L. R. 28 All. 122**

——— **ss. 176, 177 and 193**—*Civil Procedure Code, ss. 2 and 244—Order—Decree—Appeal.*—No appeal lies, from the order, as distinguished from the decree of an Assistant Collector of the first class. *Kharag Singh* v. *Pola Ram, I. L. R. 27 All. 31*, overruled. ZOHRA v. MANGU LAL (1906) . . . **I. L. R. 28 All. 753**

——— **s. 193**—*Civil Procedure Code, ss. 562 and 588—Remand—Appeal.*—There is no appeal from an order of remand passed under s. 562 of the Code of Civil Procedure in a suit or proceeding under the Agra Tenancy Act, 1901. VILAYAT HUSEN v. MAHENDRA CHANDRA NANDY (1906).
I. L. R. 28 All. 88

——— **s. 193**—*Procedure—Order remanding case to Court of first instance for retrial—Appeal.*—*Held*, that no appeal lies from an order of an appellate Court in a suit under the Agra Tenancy Act, 1901, remanding the case to the Court of first instance for trial upon the merits. ZAHUR ALI v. SHER ALI (1905) . . . **I. L. R. 28 All. 283**

AGREEMENT.

See ADVOCATE.

———*Agreement of parties to refer question to Court for decision—Decision, if appealable—Court acting as arbitrator—Extra cursum curiæ.*—In the course of a suit for recovery of possession of some land, the parties, who owned different shares of a pergunnah, came to an agreement to the effect that they should ask the Court to decide the question of title on the basis of the *thakbust* map only, and the plaintiff said he would abide by that decision. The Court decided accordingly and held that "the *thak* map itself showed that the plaintiff's predecessor and his co-sharers were disputing about the land and the survey map showed that it was newly formed *chur* land, and that in such circumstances the *thak* map could not be held sufficient evidence of plaintiff's title." *Held*, that in deciding the question on the basis of the *thakbust* map, in accordance with the agreement of the parties the Court acted as arbitrator, and hence no appeal lay from that decision. SARADINDU ROY *v.* BHAGABATI DEBYA CHOWDHURANI (1906).

10 C. W. N. 835

ALIENATION.

See HINDU LAW.

I. L. R. 33 Calc. 257, 1079

ALLUVION.

———*Gradual accretion—Definition.*—*Held*, that accretion to be considered "gradual" must be by gradual, slow, and imperceptible means. *Lopez* v. *Muddun Mohun Thakoor, 13 Moo. I. A. 467, Krishna Chandra* v. *Saeedan Bibi, 2 A. L. J. 621*, and *Ritraj Kunwar* v. *Sarsaras Kunwar, I. L. R. 27 All. 655*, referred to. NARENDRA BAHADUR SINGH *v.* ACHHAIBAR SHUKUL (1906).

I. L. R. 28 All. 647

AMALNAMA.

See REGISTRATION ACT (III OF 1877).

I. L. R. 33 Calc. 502

ANCESTRAL PROPERTY.

See CIVIL PROCEDURE CODE.

I. L. R. 28 All. 273

See HINDU LAW.

I. L. R. 28 All. 328

ANNUITY.

See CIVIL PROCEDURE CODE.

10 C. W. N. 1102

ANUBHAVAM GRANT.

See MALABAR LAW.

ANWADHEYA.

See HINDU LAW.

APPEAL.

See ARBITRATION.

See BOND.

See MESNE PROFITS.

See PRIVY COUNCIL.

See REVIEW . **I. L. R. 30 Bom. 625**

See VALUATION OF SUIT.

I. L. R. 33 Calc. 1133

———*Civil Procedure Code (Act XIV of 1882), s. 368—Death of one of the defendants—Heirs of the deceased defendant—Joint and several liability of defendants—Bengal Tenancy Act (VIII of 1885), s. 12—Transfer - Rent—Valid transfer.*—Where the liability of the defendants is joint and several, and in appeal, on the death of one of the defendants, his legal representatives are not substituted in his place, the appeal abates only so far as the deceased defendant is concerned. *Hem Kunwar and another* v. *Amba Prosad and another, I. L. R. 22 All. 430*, distinguished. Where a transfer of a tenure is only colourable and *benami*, such a transfer cannot discharge the transferor from liability to pay rent, even if the tenure was transferable and the transfer was made by a registered *kobala*. *Kristo Bulluv Ghose* v. *Kristo Lal Singh, I. L. R. 16 Calc. 462*, and *Chintamoni Dutt* v. *Rash Behari Mondul, I. L. R. 19 Calc. 17*, distinguished. JOY GOBIND LAHA *v.* MONMOTHO NATH BANERJI (1906) . . . . . **I. L. R. 33 Calc. 580**

———*Guardians and Wards Act (VIII of 1890), ss. 34, 35, 36 and 37—Minor - Guardian—Administration bond passed to Judge—Refusal of the Judge to assign.*—No appeal lies from an order passed by the District Judge under s. 35 of the Guardians and Wards Act (VIII of 1890) declining to assign the bond. GANPAT *v.* ANNA (1905).

I. L. R. 30 Bom. 164

———*Defect of parties.*—When during the pendency of an appeal against a decree for rent one of the plaintiffs respondents died and his heirs were not brought on the record. *Held*, that the appeal ought to be dismissed. *Bejoy Gopal Bose* v. *Umesh Chandra Bose, 6 C. W. N. 196*, followed. TARIP DAFADAR *v.* KHOTEJANNESSA BIBI (1906) . . . . . **10 C. W. N. 981**

———*Arbitration—Appeal against decree in accordance with award—Legality or validity of award—Civil Procedure Code (Act XIV of 1882), s. 522.*—Where on the application of the plaintiff and one of the defendants, the others not having entered appearance, a case was referred to arbitration and a decree was passed under s. 522 of the Code of Civil Procedure in accordance with the award dismissing the suit. *Held*, that the decree could not be challenged by way of appeal on the ground that there was no valid and legal award, and that it was unnecessary to go into the question whether the award was or was not a legal and valid award by reason of the fact that some of the defendants were not parties to the reference. *Ghulam Khan* v. *Muhammad Hussan, I. L. R. 29 Calc.*

APPEAL—*concluded.*

167, L. R. 29 I. A. 51, followed. *Chintamoni Aditya* v. *Haladhar Maiti, 2 C. L. J. 153,* and *Haranunda Naskar* v. *Doyal Chand Naskar, 2 C. L. J. 142,* approved. *Parsidh Narain Singh* v. *Ghanshyam Narain Singh, 9 C. W. N. 873,* dissented from. CHAIRMAN OF THE PURNEA MUNICIPALITY v. SIVA SANKAR RAM (1906).

I. L. R. 33 Calc. 899

———— *"Judgment," meaning of—Letters Patent, cl. 15—Jurisdiction.*—An order refusing to enlarge the time for preferring an appeal which is already time barred, is not a "judgment" within the meaning of cl. 15 of the Letters Patent, and is not, therefore, appealable under that clause. *Justices of the Peace for Calcutta* v. *The Oriental Gas Company, 8 B. L. R. 433; Kishen Pershad Panday* v. *Tiluckdhari Lall, I. L. R. 18 Calc. 182; Mahabir Prosad Singh* v. *Adhikary Kunwar, I. L. R. 21 Calc. 473; Malji Virji* v. *Bangabashi Saha, 9 C. W. N. 502,* referred to. *Luchminarain Bogla* v. *Brij Coomaree, 5 C. W. N. 781,* distinguished. GOVINDA LAL DAS v. SHIBA DAS CHATTERJEE (1906) **I. L. R. 33 Calc. 1323**
s.c. 10 C. W. N. 986

———— *Appeal against order of District Court granting sanction—Criminal Procedure Code (Act V of 1898), s. 195, cls. 6, 7—Power of High Court on such appeal.*—An appeal lies to the High Court against an order of the District Judge granting sanction under cls. 6 and 7 of s. 195 of the Code of Criminal Procedure where such order has revoked the sanction granted by the Munsif for prosecution under certain sections of the Penal Code, but granted sanction to prosecute under other sections; and it is competent to the High Court on appeal therefrom, not only to revoke the sanction granted, but also to grant the sanction refused. KANNAMBATH IMBICHI NAIR v. MANATHANNATH RAMAR NAIR (1905).

I. L. R. 29 Mad. 122

APPEAL TO PRIVY COUNCIL.

———— *Competency—Power of Local Court to admit appeal—Question of competency left open by local Court—Objection at hearing—Dismissal of appeal—Value of appeal—Action for injunction against infringement of trade mark.*—Where the Local Statutes contemplate that appeals to the Privy Council shall be allowed to lie on the local Court satisfying itself as to its competency and the local Court in its order in one case expressly left the question of competency open. *Held,* by the Judicial Committee, that the appeal was not competent. GILLETT COMPANY v. LUMSDEN (1905) . . . . . **10 C. W. N. 7**

———— *Cases in which appeal lies or not—Valuation of appeal—Value of the subject-matter of the suit—Decree involving question to property of appealable value—Claim for future mesne profits—Civil Procedure Code (Act XIV of 1882), s. 596.*—In a suit for possession of land and for mesne profits the plaintiffs obtained a decree in the first Court. They valued the land at R5,460 and

APPEAL TO PRIVY COUNCIL—*concluded.*

in the proceedings in execution of the decree they put in a claim for mesne profits for over R30,000. The amount of the profits was not ascertained as the proceedings were stayed pending an appeal to the High Court, which was ultimately successful. The plaintiffs applied for leave to appeal to His Majesty in Council and swore that the mesne profits would amount to a sum exceeding R10,000. *Held,* that the plaintiffs were entitled to take into account their claim for mesne profits with a view to ascertaining whether the value of the matter in dispute reached the statutory amount of R10,000, and that any way the decree involved, directly or indirectly, some claim or question to or respecting property of the value of R10,000 within the meaning of s. 596 of the Code, and that in either view the plaintiffs were entitled to a certificate. *Mohideen Hadjiar* v. *Pitchey, A. C. 193,* referred to. DALGLEISH v. DAMODAR NARAEN CHOWDHRY (1906).

I. L. R. 33 Calc. 1286

———— *Practice—Application to High Court for certificate for leave to appeal to Privy Council—Grounds for refusal of leave.*—It is desirable that the High Court, in refusing a certificate for leave to appeal to His Majesty in Council, should state their reasons for refusing it. VENGANATH SWAROOPATHIL VALIA NAMBIDI v. CHERAKUNNATH NAMBIYATHAN NAMBUDRIS KRISHNAN NAMBUDRIPAD (1906) . . **I. L. R. 29 Mad. 194**
s.c. L. R. 33 I. A. 67
10 C. W. N. 545

———— *Stay of execution of decree pending appeal—To what Court application should be made—Power of High Court to grant stay of execution up to determination of Privy Council appeal—Order of Judicial Committee granting stay of execution where High Court had not done so.*—Application for stay of execution of a decree pending an appeal to His Majesty in Council should always be made, in the first instance at any rate, to the Court in India which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details, which the Judicial Committee cannot possess on an interlocutory application. In this case the High Court were of opinion that they had no power to grant a stay of execution up to the determination of the appeal by the Privy Council, but their judgment showed that they thought it ought to be granted; and the Judicial Committee allowed such a stay of execution upon terms. VASUDEVA MODELIAR v. SADAGOPA MODELIAR (1906).

I. L. R. 29 Mad. 379
s.c. L. R. 33 I. A. 132

APPELLATE COURT.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) . **I. L. R. 33 Calc. 927**

See PARTIES . **I. L. R. 33 Calc. 425**

See RIOTING . **I. L. R. 33 Calc. 295**

APPORTIONMENT.

See CIVIL PROCEDURE CODE.

See LANDLORD AND TENANT.

ARBITRATION.

See AGREEMENT.

See APPEAL . I. L. R. 33 Calc. 899

See ARBITRATION ACT (IX OF 1899), SS. 4, 5 . . I. L. R. 33 Calc. 1237

See CIVIL PROCEDURE CODE. 10 C. W. N. 601, 609

See GRANT . I. L. R. 33 Calc. 1290

See LIMITATION ACT (XV OF 1877), ARTS. 113, 120, 144, 178. I. L. R. 33 Calc. 881

——— *Arbitration without the intervention of the Court—Order directing it to be filed—Judgment and decree thereon—Appealability of the order—Revision—Civil Procedure Code (Act XIV of 1882), ss. 522, 525, 526 and 622.—Held,* by the Full Bench (RAMPINI and PRATT, *JJ., dissenting*) that an appeal lies from an order under s. 526 of the Civil Procedure Code merely directing the award to be filed. *Per* MACLEAN, *C.J.*, and GHOSH, *J.*—When an award has been ordered to be filed under s. 526 of the Code, the party in whose favour it is passed must proceed to obtain a judgment and consequent decree under s. 522, and, if that decree is in accordance with the award, there is no appeal from it. *Per* SALE, *J.*—No decree expressly incorporating the terms of the award is required to be drawn up in pursuance of the order under s. 526, to file the award. The award may be executed under the Code, as if it were a decree of the Court. *Per* RAMPINI and PRATT, *JJ.*—An appeal lies from an order under s. 526, refusing to file an award, but not from an order directing it to be filed, except in the cases specified in s. 522. When an order was passed by the Munsiff that the award be filed in Court, and a formal decree was drawn in the following terms: "It is ordered that the arbitration award in this case be filed in Court." *Held per* GHOSH, RAMPINI and PRATT, *JJ.*, that the decree was substantially such as was contemplated by s. 526 read with s. 522, and that no appeal lay from it. *Held further* by the Full Bench that, if no appeal lay from an order directing the award to be filed, and the Lower Appellate Court entertained an appeal, the High Court has the power to interfere with the decree of the Court below either on second appeal or under s. 622 of the Code. *Mahomed Wahiduddin* v. *Hakiman, I. L. R. 25 Calc. 757; Punnusami Mudali* v. *Mandi Sundara Mudali, I. L. R. 27 Mad. 255; Ghulam Khan* v. *Muhammad Hussan, I. L. R. 29 Calc. 167,* referred to: *Surjan Raot* v. *Bhikari Raot, I. L. R. 21 Calc. 213,* approved of. *Chinta Money Aditya* v. *Haladhur Maiti, 10 C. W. N. 601,* referred to. JANOKEY NATH GUHA *v.* BROJO LAL GUHA (1906). I. L. R. 33 Calc. 757 s.c. 10 C. W. N. 609

——— *Award, validity of—Decree in accordance with award—Irregularity—Appeal—Civil Procedure Code (Act XIV of 1882), s. 522—Practice.*—Two out of three arbitrators agreed in making an award, but the third did not agree, and the award was filed in the Court of first instance without the signature of the dissentient arbitrator, who however subsequently came into Court and signed it. The Court thereupon made a decree in accordance with the award. On appeal to the Subordinate Judge, however, this decree was set aside on the ground that such an award was invalid and illegal. On second appeal to the High Court, *Held,* that after the award had been filed in Court it was not open to the dissentient arbitrator to come in and sign the award, nor had the Court any power to allow him to sign it; and that in this view of the matter, the award was invalid and illegal. An appeal under s. 522 of the Civil Procedure Code against a decree made in accordance with an award depends upon the validity or otherwise of the award itself; that section presupposes a valid and legal award and not an award upon which no decree could be pronounced. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar, I. L. R. 13 All. 300; L. R. 18 I. A. 55; Jafri Begum* v. *Syed Ali Raza, I. L. R. 23 All. 393,* and *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee, I. L. R. 25 Calc. 141,* referred to. RAMESH CHANDRA DHAR *v.* KARUNAMOYI DUTT (1906) . I. L. R. 33 Calc. 498

——— *Award to be filed in Court having jurisdiction over the matter submitted—Award not invalidated by want of notice nor by the arbitrator's accepting a fee—Jurisdiction.*—The omission to give notice of the meeting of the arbitrators to a party who had, prior to such meeting, notified to the arbitrators his withdrawal from the submission, does not invalidate an award; nor does the fact that the arbitrators, at the suggestion and with the consent of all parties accepted remuneration for their trouble, make the award illegal. The Court having jurisdiction to file the award is determined by the value of the matter to which the arbitration related, and not by the amount actually allowed under the award. *Narsingh Das* v. *Ajodhya Prosad Sukel, I. L. R. 31 Calc. 203,* referred to. SUBRAYA PRABHU *v.* MANJUNATH BHAKTA (1906) . . . I. L. R. 29 Mad. 44

——— *Arbitration—Validity of reference disputed—Jurisdiction of Court to decide as to validity of reference—Civil Procedure Code, s. 622.—Held,* that upon an application made to it under s. 525 of the Code of Civil Procedure, the Court has jurisdiction to and is bound to enquire into the question whether the parties had or had not referred the matter in question to arbitration. *Amrit Ram* v. *Dasrat Ram, I. L. R. 17 All. 21, Mahomed Wahid-ud-din* v. *Hakiman, I. L. R. 25 Calc. 757,* and *Manilal Hargovandas* v. *Vanmalidas Amratlal, I. L. R. 29 Bom. 621,* referred to. GANESH SINGH *v.* KASHI SINGH (1906). I. L. R. 28 All. 621

——— *Award—Objections to award—Award set aside.—Appeal.—Held,* that no appeal lies from an order under s. 521 of the Code of Civil Procedure

ARBITRATION—*concluded.*

setting aside an award. *Shyama Charan Pramanik* v. *Prolhad Durwan, 8 C. W. N. 390,* followed. *Naurang Singh* v. *Sadapal Singh, I. L. R 10 All. 8,* overruled. *Pureshnath Dey* v. *Nabin Chunder Dutt, 12 W. R. 93,* and *Rughoobur Dyal* v. *Maina Koer, 12 C. L. R. 564,* referred to. GANGA PRASAD *v.* KURA (1906) . . **I. L. R. 28 All. 408**

——— *Award—Order rejecting application to file award made out of Court—Appeal.—Held,* that no appeal will lie from an order refusing to file an award made between the parties without the intervention of a Court. *Bhola* v. *Gobind Dyal, I. L. R. 6 All. 186,* and *Katik Ram* v. *Babu Lal, Weekly Notes, 1903, p. 234,* followed. *Gholam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167,* distinguished. *Mahammad Newaz Khan* v. *Alam Khan, I. L. R. 18 Calc. 414,* referred to. BASANT LAL *v.* KUNJI LAL (1905). **I. L. R. 28 All. 21**

ARBITRATION ACT (IX OF 1899).

——— **ss. 4 and 5**—*Submission—Contract by bought and sold notes—Arbitration clause—Award ex parte—Rules of the Bengal Chamber of Commerce.*—A clause providing for the reference of any dispute to arbitration, contained in a contract effected by means of bought and sold notes, identical in their terms and signed by the respective parties or their agents, constitutes a "submission" within the meaning of s. 4 of the Arbitration Act. *Caerleon Tinplate Company* v. *Hughes, 60 L. J. Q. B. 640,* distinguished. A party to such a contract and the arbitrators are entitled to proceed in the absence of the other party, if the latter has had due notice to attend the reference, and, although the Court will not decree specific performance of an agreement to arbitrate, yet it will enforce an *ex parte* award made on such reference. *In re Smith and Service and Nelson and Sons, 25 Q. B. D. 545,* referred to. RAM NARAIN GUNGA BISSEN *v.* LILADHUR LOWJEE (1906) . **I. L. R. 33 Calc. 1237**
s.c. 10 C. W. N. 814

——— **ss. 4, 20**—*Contract Act (IX of 1872), s. 28—Arbitration clause in a contract, whether valid—Reference to an association—Power to delegate.*—An arbitration clause in a contract amounts to a "submission" within the meaning of s. 4 of the Indian Arbitration Act, and is valid, being covered by exception (1) to s. 28 of the Contract Act. When reference is made to an association consisting of a large and fluctuating body of persons, who cannot sit as a tribunal, the association has power to appoint individuals to act as arbitrators, and the rules of the association will be binding on the parties. GANGES MANUFACTURING COMPANY *v.* INDRA CHAND (1906) . . **I. L. R. 33 Calc. 1169**

"ARIAT."

See MUHAMMADAN LAW.

ARMS ACT (XI OF 1878).

——— **ss. 19 and 20**—*Definition—Concealment of arms on search being made by the Police—Mere denial of possession not concealment—Possession of unlicensed arms.—Held,* that the mere denial on the part of a person, whose house is being searched by the Police for unlicensed arms, that he has any such arms in his possession does not constitute a concealment or attempt to conceal arms on search being made by the police within the meaning of the second paragraph of s. 20 of Act XI of 1878. *Held,* also, that where unlicensed arms are found concealed upon premises which, though legally the joint property of a joint Hindu family, are in fact at the time of the finding in the exclusive possession and control of one member of the family, that member of the family can properly be held to be in possession of such arms. *Queen-Empress* v. *Sangam Lal, I. L. R. 15 All. 129,* distinguished. EMPEROR *v.* RAM SARUP (1905). **I. L. R. 28 All. 302**

ARREARS OF RENT.

See ABWABS . **I. L. R. 33 Calc. 683**

ASSAM FOREST REGULATION (VII OF 1891).

——— **s. 40**—*Rules—Onus of proof.*—In order to support a conviction for breach of rules 1 and 2 framed under s. 40 of the Assam Forest Regulation, the onus is on the prosecution to prove that the forest produce was being removed along some route other than the two routes prescribed by rule 1. The mere fact of its being found concealed under suspicious circumstances is not sufficient to remove that onus from the prosecution and to throw the burden on the accused of proving that it was on its way for conveyance by an authorized route. MOTI THAKOOR *v.* DEPUTY CONSERVATOR OF FORESTS (1906) . . **I. L. R. 33 Calc. 895**

ASSETS, RATEABLE DISTRIBUTION OF.

See ATTACHMENT.

ASSIGNABILITY.

See ASSIGNMENT.

See CONTRACT.

ASSIGNMENT.

See ADMINISTRATION BOND.

——— *Assignability of executory contract—Actionable claim—Fraudulent assignment—Transfer of Property Act (IV of 1882), ss. 3 and 6, cl. (h)—Contract Act (IX of 1872), s. 23.*—The rule in this country as to the assignability of an executory contract for the purchase and sale of goods is that the *benefit* of such a contract can be assigned; understanding by *benefit* the beneficial interest under

ASSIGNMENT—*concluded.*

the contract and the right to enforce it. This rule is subject to certain qualifications, *viz.*, (1) that the benefit is not coupled with a liability and (2) that the nature of the contract has not been affected by personal considerations. Such a contract falls within the rule which is in existence and in force in this country as to assignment of contracts. Such a contract, though perhaps contingent in character, comes within the definition of *actionable claim* in the Transfer of Property Act, s. 3. An assignment made under such circumstances as to amount to a fraud of the Bankruptcy Law falls clearly within s. 6, cl. (*h*) of the Transfer of Property Act and is void. The word object in s. 23 of the Contract Act is not used in the same sense as *consideration*. It means purpose or design. JAFFER MEHER ALI *v.* BUDGE BUDGE JUTE MILLS CO., LD. (1906) . . . **10 C. W. N. 755**
s.c. **I. L. R. 33 Calc. 702**

ASSIGNMENT OF EXECUTORY CONTRACT.

See ASSIGNMENT.

ATTACHMENT.

See CIVIL PROCEDURE CODE.
I. L. R. 33 Calc. 337, 575

See EXECUTION.

See RECEIVER.

——— *Execution of decree—Attachment—Decree for money—Decree for sale of mortgaged property.*—A decree for the sale of immoveable property under s. 88 of the Transfer of Property Act is not a decree for the payment of money or a decree for money, and is therefore liable to attachment and sale under the penultimate clause of s. 273 of the Code of Civil Procedure. *Takiya Begam* v. *Siraj-ud-daula, Weekly Notes, 1885, p. 123,* overruled. *Abdullah* v. *Doctor Oosman, I. L. R. 28 Mad. 244,* dissented from. *Sultan Kuar* v. *Gulzari Lal, I. L. R. 2 All. 290, Ram Charan Bhagat* v. *Sheobarat Rai, I. L. R. 16 All. 418, Barhma Din* v. *Baji Lal, I. L. R. 26 All. 91, Shiam Sandar* v. *Mahammad Ihtisham Ali, I. L. R. 27 All. 501, Jogul Kishore* v. *Cheda Lal, Weekly Notes, 1893, p. 184, Gopal Nana Shet* v. *Johari Mal Valad Jitaji, I. L. R. 16 Bom. 522, MacNaghten* v. *Surja Prasad Misra, 4 C. W. N.* XXXV, and *Baij Nath* v. *Binoyendra Nath, 6 C. W. N. 5,* referred to. DELHI AND LONDON BANK *v.* PARTAB SINGH (1906) . **I. L. R. 28 All. 771**

——— *Execution—Civil Procedure Code (Act XIV of 1882), ss. 230, 269, 272, 295, 499, 490—Suit—Assets, rateable distribution of—Decree—Sale of goods subject to speedy and natural decay, effect of.*—*R* in a suit against *M* attached certain goods before judgment and at *R*'s instance the goods were sold as perishable articles and the sale proceeds paid into Court. Subsequently *S* obtained a decree against *M* in another suit. *R* now obtained a decree in his suit. Upon this *S* attached the moneys in Court. On *R*'s application for an order that his claim be satisfied out of the moneys in Court in priority to the claim of *S* or in the alternative *pari passu*. *Held*, that *S* should rank *pari passu* with *R*. An attachment before judgment, though it gives a security, does not create any charge on the property attached, which remains that of the defendant. Nor does a decree following such attachment place *ipso facto* in a better position the creditor, who must apply for execution from which he is not exempted by s. 490 of the Civil Procedure Code. On such application for execution, the attachment before judgment enures and becomes an attachment in execution. But neither attachment before judgment nor process incidental thereto, such as the sale of the goods attached prior to decree under s. 296, give a decree-holder applying for execution any right to preferential treatment over another judgment-creditor, who has also before the date of such application himself taken out execution of his decree. SEWDUT ROY *v.* SREE CANTO MAITY (1906).
I. L. R. 33 Calc. 639

——— *Existence of decree at time of attachment necessary to make it valid.*—An attachment in execution, whether made by the Court which passed the decree or by the Court to which such decree had been transferred for execution, is null and void, if at the time of attachment the decree had been set aside and was non-existent; and a renewed decree, in the same terms as the original decree, passed subsequently will not validate it. CHETTIATTIL MUHAMOD *v.* KUNHI KORU (1905).
I. L. R. 29 Mad. 175

ATTESTATION.

——— *Mortgage bond Transfer of Property Act (IV of 1882), s. 59.*—Where the signatures of the witnesses to a mortgage bond, who had witnessed the execution of the deed, were affixed for them to the deed by another person with their consent. *Held*, that the deed was properly attested within the meaning of s. 59 of the Transfer of Property Act. SASI BHUSAN PAUL *v.* CHANDRA PESHKAR (1906) . . . . **I. L. R. 33 Calc. 861**

——— *Effect of arbitration.*—Mere attestation of a deed does not necessarily import an assent to all the recitals contained therein. IMAM ALI *v.* BAIJNATH RAM SAHU (1906) . **10 C. W. N. 551**
s.c. **I. L. R. 33 Calc. 613**

AUCTION-PURCHASER.

See REVENUE SALE LAW, s. 37.
10 C. W. N. 148

AWARD.

See ARBITRATION.

AYANTUKA STRIDHAN, DESCENT OF.

See HINDU LAW.
I. L. R. 33 Calc. 23

See POSSESSION.
I. L. R. 33 Calc. 33

B

BABUANA GRANT.

See HINDU LAW.

See MITAKSHARA.

I. L. R. 33 Calc. 1150

BABUANA PROPERTY.

See HINDU LAW . 10 C. W. N. 978

BELCHAMBER'S RULES AND ORDERS, 730, 785.

See TAXATION . I. L. R. 33 Calc. 827

BENAMI.

See MAHOMEDAN LAW.

10 C. W. N. 706

——— *Fraudulent transfer—Benami deeds with intent to defraud creditor—Fraud not carried into effect—Suit by real owner against benamidar.*—Plaintiff against whom several decrees for money were outstanding, with the object of protecting his properties from the claim of the decree-holders, executed a deed of relinquishment in favour of the defendant declaring that the properties belonged to the latter; the decrees were ultimately set aside on appeal and the plaintiff sued to recover possession of the properties on declaration of his right thereto. *Held* that, where the intention to commit fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him is *benami* and that the plaintiff was entitled to recover. *Yaramati Krishnayya* v. *Chundra Papayya, I. L. R. 20 Mad. 326,* and *Chenvirappa* v. *Puttapa, I. L. R. 11 Bom. 708,* dissented from. Authorities reviewed by MOOKERJEE, *J.* JADU NATH PODDAR *v.* RUP LAL PODDAR (1906).

I. L. R. 33 Calc. 967
s.c. 10 C. W. N. 650

——— *Benami transaction—Gift—Sale—Intention—Imaginary consideration inserted in a deed of gift—Evidence of intention—Evidence Act (I of 1872), s. 92—Mother and daughter—Undue influence—Presumption—Unsoundness of mind—Pleadings—Purdanashin, who is.*—The question whether a transaction which on its face purports to be a gift or a sale is really a *benami* transaction is purely one of intention. Notwithstanding that a transaction purported to be a sale and a price was mentioned in the conveyance, it was held on the evidence to be a gift and not a sale—the question being regarded as purely one of intention. When transfers of property made by a mother in favour of a daughter were challenged on the ground of the unsoundness of mind of the donor, but no case of undue influence exercised by the donee on the donor was raised in the pleadings,

BENAMI—*concluded.*

and evidence was given with reference to the question of unsoundness of mind only. *Held,* that the question of undue influence could not properly be discussed and considered upon such evidence. The mere relation of daughter to mother in itself suggests nothing in the way of special influence or control. Their Lordships of the Judicial Committee did not treat as *purdanashin* a lady, who had no objection to communicate, when necessary, in matters of business, with men other than members of her own family, who was able to go to Court to give evidence and to attend at the Registrar's office in person to acknowledge her deeds for the purpose of registration. ISMAIL MUSSAJEE MOOKERDAM *v.* HAFIZ BOO (1906) . . 10 C. W. N. 570
s.c. I. L. R. 33 Calc. 773
L. R. 33 I. A. 86

BENAMI LEASE.

See LANDLORD AND TENANT.

I. L. R. 33 Calc. 967, 985

BENAMI TRANSACTION.

See UNDUE INFLUENCE.

I. L. R. 33 Calc. 773

BENGAL ACT—1869—VIII.

See RIGHT OF OCCUPANCY.

——— **1870—V.**

See PORT COMMISSIONERS' ACT.

——— **1870—VI.**

See CHAUKIDARI CHAKRAN ACT.

See CHAUKIDARI CHAKRAN LAND, SETTLEMENT OF.

See VILLAGE CHAUKIDARI ACT.

——— **1871—XXIII.**

See PENSIONS ACT.

——— **1876—VI.**

See CHUTIA NAGPUR ENCUMBERED ESTATES ACT.

——— **1876—VIII.**

See ESTATES PARTITION ACT.

——— **1879—I.**

See CHUTIA NAGPUR LANDLORD AND TENANT PROCEDURE ACT.

——— **1879—IX.**

See COURT OF WARDS ACT.

——— **1880—VII.**

See PUBLIC DEMANDS RECOVERY ACT.

——— **1880—IX.**

See BENGAL CESS ACT.

BENGAL ACT—1884—III.

See BENGAL MUNICIPAL ACT.

——— 1885—VIII.

See BENGAL TENANCY ACT.

——— 1895—I.

See PUBLIC DEMANDS RECOVERY ACT.

——— 1897—V.

See PARTITION ACT.

——— 1899—III.

See CALCUTTA MUNICIPAL ACT.

BENGAL CHAMBER OF COMMERCE RULES.

See ARBITRATION ACT.

BENGAL MUNICIPAL ACT (BENGAL ACT III OF 1884).

See BURNING GHAT. **10 C. W. N. 1044**

See GRANT.

BENGAL REGULATION VIII OF 1819.

——— s. 2, cl. 4.

See s. 74 . . . **10 C. W. N. 527**

——— s. 3, cl. (5).

See PUTNI TALUK. . **10 C. W. N. 201**

——— s. 8.

See PUTNI TENURE.

BENGAL TENANCY ACT (VIII of 1885).

——— s. 3, cl. (5).

See RENT.

——— s. 3, cl. (5)—*Kabuliyat, construction of—Putni tenure—Putnidar—Government revenue—Agreement—Regulation VIII of 1819, s. 3, cl. (3)—Liability of tenure to be sold for arrears of Government revenue under agreement by putnidar to pay it—Penalty for default provided by kabuliyat.*—The respondent held certain properties under the appellant on putni tenure on terms which were embodied in two kabuliyats executed by the respondent in 1885 and 1893 respectively, in the former of which it was stated that "the annual jumma of this putni mahal is fixed at ₹6,000. Besides the said putni rent I take upon myself the duty of depositing in the Collectorate the Government revenue of ₹40,156 fixed for the eight anna share of the said mahals." The kabuliyat of 1893 was to the effect that, "having agreed to pay an additional rent of ₹1,000 in respect of the putni, which I took . . . on the condition of paying you a putni jumma of ₹6,000 per year and of the ₹40,156 into the Collectorate year by year and kist by kist as Government revenue for the said eight-anna share, I hereby promise . . . that from the present year I shall pay the ₹1,000 in excess as jumma for my said putni taluk." Provision was also made in the kabuliyats for payment by the respondent of certain cesses. On default in payment of the jumma of ₹7,000 of the cesses they were to be recovered as arrears of rent under Regulation VIII of 1819; but for default in payment of the Government revenue the penalty was declared to be forfeiture of the tenure. *Held* (affirming the decision of the High Court) that, according to the true construction of the kabuliyats read with Regulation VIII of 1819, the Government revenue was not "money payable to the landlord" and therefore not "rent" within the meaning of s. 3, cl. (5) of the Bengal Tenancy Act (VIII of 1885): and consequently it could not be recovered by summary sale under the provisions of Regulation VII of 1819. JOTINDRA MOHUN TAGORE *v.* JARAO KUMARI (1905) . . . . **I. L. R. 33 Calc. 140**
s.c. 10 C. W. N. 201
L. R. 33 I. A. 30

——— s. 11—*Transfer of tenure piece-meal, if sub-division—Liability of transferor for rent.*—Where a *dur-putnidar*, to the knowledge of his landlord, transferred a portion of the *dur-putni* to one person on one date, and the remainder to another person on a subsequent date. *Held* (MACLEAN, *C.J.*, *dubitante*), that, after the second transfer, the liability of the *dur-putnidar* for rent ceased and the two transferrees became jointly and severally liable to the landlord for the same. *Kristo Bulluv Ghose* v. *Kristo Lal Singh*, *I. L. R. 16 Calc. 642*; *Chintamoni Dutt* v. *Rash Behari Mondal*, *I. L. R. 19 Calc. 17*, and *Sreemutty Jogemaya Dassi* v. *Girindra Nath Mukherjee*, *4 C. W. N. 590*, referred to. MACLEAN, *C.J.*—The act of the *dur-putnidar* in transferring the tenure piece-meal had the effect of dividing the tenure contrary to the provisions of s. 88 of the Bengal Tenancy Act. KISHORI RAMAN KAPURIA *v.* ANANTA RAM LAHA (1905) . . . **10 C. W. N. 270**

——— s. 12.

See APPEAL.

——— ss. 12, 17, 88—*Transfer of a tenure—Liability of tenant.*—Where the defendant held separately a share of a *sikmi taluq* under the plaintiff, and transferred that share to a third party and served a notice of the transfer on the plaintiff landlord as prescribed by s. 12 of the Bengal Tenancy Act. *Held*, that the act of the defendant in making the transfer did not amount to a sub-division of the tenure, and that the defendant was not liable for rent for any period subsequent to the transfer. *Chintamani Dutt* v. *Rash Behari Mondul*, *I. L. R. 19 Calc. 17*, referred to. KALI SUNDARI DEBI *v.* DHARANI KANTA LAHIRI (1905).
I. L. R. 33 Calc. 279
s.c. 10 C. W. N. 272

——— ss. 12, 17, 88.

See LANDLORD AND TENANT.

——— s. 15—*Succession by a shebait to debutter property—Suit for rent—Endowment.*—

BENGAL TENANCY ACT (VIII OF 1885)—*continued.*

The right to possession and management of a dedicated property belongs to the *shebait* and the right to bring a suit for rent is vested in the *shebait* and not in the idol; consequently when on the death of one *shebait* another *shebait* succeeds to a permanent tenure and does not according to s. 15 of the Bengal Tenancy Act give a notice of succession to the landlord, s. 16 is an effective bar to the recovery of a decree for rent. MABATULLAH NASYA *v.* NALINI SUNDARI GUPTA (1905) . . **10 C. W. N. 42**

——— **ss. 20, cl. (7), and 180**—*Chur land—Onus of proof—Presumption of holding chur land continuously for twelve years—Reg. XI of 1825, s. 4—Raiyat having no pre-existing right to the land—Right of accretion.*—*Held*, that the presumption, which is created by s. 20, cl. (7), of the Bengal Tenancy Act in respect of that section could not be applied to s. 180 of that Act. In *dearah* or *chur* land the person, who alleged that he had been for twelve continuous years in possession, would have to prove that allegation. *Held* further, that s. 4 of Reg. XI of 1825 could not apply, there being no pre-existing right to the land in the tenants, to which any right to the later accretion can be said to be annexed. BENI PERSAD KOERI *v.* CHATURI TEWARY (1906).
I. L. R. 33 Calc. 444

——— **s. 21.**

See ZURIPESHGI LEASE.

——— **s. 21**—*Zurpeshgi lease—Lease for cultivation—Occupancy, right of, whether can arise—Bengal Tenancy Act (VIII of 1885), s. 21.*—Neither of the cases, *Bengal Indigo Co.* v. *Raghubar Das, I. L. R. 24 Calc. 272*, and *Ram Khelawan Roy* v. *Sambhoo Roy, 2 C. W. N. 758*, is authority for the proposition that a raiyat by taking a *zuripeshgi* lease of land of which he was previously or then put in possession as a raiyat, loses his *raiyati status* or divests himself of his right to acquire a right of occupancy in the land. *Held*, on the terms of the present lease, that it was a cultivating lease and that the lessee did by 12 years' continuous possession acquire a right of occupancy over the leased land. RAMDHARI SINGH *v.* MACKENZIE (1905) . . . . . **10 C. W. N. 351**

——— **s. 29.**

See ENHANCEMENT.

See SECOND APPEAL.

——— **s. 50**—*Presumption—Landlord and tenant—Ejectment.*—Where a landlord brings a suit for ejectment on the allegation that his tenant, who had a non-transferable holding, has sold it to a third person (one of the defendants) and has abandoned the holding. *Held*, that s. 50 of the Bengal Tenancy Act has no application to such a case. SARAT CHANDRA GHOSE *v.* SHYAM CHAND SINGH (1906) . . . . . **10 C. W. N. 930**

——— **s. 52**—*Increase of rent for increased area—Burden of proof.*—In a suit brought by a landlord for increase of rent on account of an increase in the area of a holding it was found that the tenant was holding the same lands without any variation in the boundaries; that the landlord failed to prove what area was originally leased to the tenant; and there were no materials before the Court for the determination of the question whether the rent was a consolidated rent or not. *Held*, that the landlord was not entitled to any increase under s. 52 of the Bengal Tenancy Act. In order to succeed the landlord must prove facts and circumstances showing that there was some reason not within the control of the landlord for additional lands being included in the holding. *Gouri Patra* v. *Reily, I. L. R. 20 Calc. 579*, and *Rajendra Lal Goswami* v. *Chundra Bhuson Goswami, 6 C. W. N. 318*, relied on. RATAN LALL BISWAS *v.* JADU HALSANA (1905).
10 C. W. N. 46

——— **s. 65**—*Right of co-sharer landlords to collect rent jointly.*—*A* and *B* being co-sharer landlords collected rent from their tenants *C* and *D* separately. Subsequently *C* and *D* sold the interest to *E*. *A* and *B* then demanded rent from *E* jointly. *E* objected on the ground that *A* and *B* having collected their rent separately for many years, could not now sue jointly. *Held*, that there was nothing to prevent the co-sharer landlords from suing *E* jointly for their rent, there being no evidence to show that the former agreement to collect rent separately was to be perpetual. *Shyama Charan Bhuttacharya* v. *Akhoy Kumar Mitter, 10 C. W. N. 167, Grish Chunder Mukhopadhyaya* v. *Chhatradhar Ghose, 3 C. L. J. 379*, followed. *Gani Mahomed* v. *Moran, I. L. R. 4 Calc. 96. Gopal Chandra Das* v. *Umesh Narain Chowdhury, I. L. R. 17 Calc. 695*, referred to. *Raja Promoda Nath Roy* v. *Raja Ramoni Kanta Roy, 9 C. W. N. 34*, distinguished. AKSHOY KUMAR MITRA *v.* GOPAL KAMINI DEBI (1906).
I. L. R. 33 Calc. 1010
s.c. 10 C. W. N. 952

——— **s. 65**—*Benami transactions—Benami lease—Authority of benamdar registered tenant to pledge the tenure for arrears of rent—Mortgage—Form of mortgages—Agreement not to alienate—Transfer of interest—Creation of charge—Absence of attestation—Charge—Transfer of Property Act (IV of 1882), ss. 58, 59, 100—Charge for rent.*—When *A* held a tenure in the benami of *B*, who was the recorded tenant, and the latter without the knowledge or consent of *A* executed a bond in favour of the landlord, who knew that *B* was merely a benamdar, mortgaging or charging the tenure for arrears of rent due in respect thereof. *Held*, that the bond could not affect the tenure and that the landlord suing on the bond was not entitled to claim a charge on the land under s. 65 of the Bengal Tenancy Act. *Per* MOOKERJEE, *J.*—The test is whether *B* acted within the scope of his authority. A nominal owner has no implied authority to pledge the property in arrears on the real owner failing to pay the rent regularly. An instrument, by which the payment

BENGAL TENANCY ACT (VIII OF 1885)—*continued.*

of money is secured on land, must be taken to create a mere charge, unless there is an indication in it that some interest in specific immoveable property was transferred; a clause entitling the creditor to recover his dues by attachment and sale of the property and a clause against alienation lend support to the view that a mere charge was intended to be created. S. 100 of the Transfer of Property Act does not mean that a transaction purporting on the face of it to be a mortgage is converted into a charge, if the instrument cannot operate as a mortgage by reason of defective execution or non-compliance with the formalities prescribed by the law. ROYZUDDI SHEIK *v.* KALI NATH MUKERJEE (1905).
I. L. R. 33 Calc. 985

——— **ss. 65, 70, 87.**

See LANDLORD AND TENANT.

——— **ss. 65, 170**—*Plaintiff also a landlord at the date of the suit and decree for arrears of rent—Sale—Tenure—Claim—Civil Procedure Code (Act XIV of 1882), s. 278.*—If at the time when a suit for arrears of rent is instituted and a decree made the plaintiff is still the landlord, the fact that he has subsequently sold his interest in the property does not prevent him from obtaining the benefit of s. 65 of the Bengal Tenancy Act and executing the decree against it. The suit having been instituted and the decree passed under this Act, s. 170 of the Bengal Tenancy Act excludes the operation of s. 278 of the Civil Procedure Code. *Hem Chandra Bhanja* v. *Mon Mohini Dassi, 3 C. W. N. 604*, overruled. KHETRA PAL SINGH *v.* KRITARTHAMOYI DASSI (1906) . . . . **I. L. R. 33 Calc. 566**
s.c. 10 C. W. N. 547

——— **ss. 65, 159**—*Sale in execution of a decree for arrears of rent at the instance of a co-sharer landlord—Interest of unrecorded tenant how effected.*—An occupancy holding was recorded in the landlord's books in the names of *N*, *B* and *T* as tenants. Plaintiff purchased the interest of *N* and *B*. The validity of his purchase was established. Subsequently one of the co-sharer landlords brought a suit against *N*, *B* and *T* for his share of the rent and got a decree; in execution of the decree the holding was sold and purchased by the 1st defendant. *Held*, that the 1st defendant purchased only the right, title and interest of the judgment-debtors. AFRAZ MOLLAH *v.* KULSUMANNESSA BIBEE (1906).
10 C. W. N. 176

——— **ss. 67, 74, 178 [3]; cl. H.**

See ABWAB.

——— **s. 74**—*Abwabs—Permanent tenure-holder under lease created before the Act—Stipulation to pay the price of 3 cocoanuts and render one day's personal service, over and above rent—If enforcible—Reg. V of 1812, s. 3—Act X of 1859, s. 10.*—*Abwabs* are not recoverable from a permanent tenure holder under a lease created before the Bengal Tenancy Act came into operation. They could not be recovered under Reg. V of 1812 and Act X of 1859, and cannot be recovered under s. 179 of the Bengal Tenancy Act, owing to the operation of cl. (4) of s. 2 of the Act. APURNA CHURN GHOSE *v.* KASAM ALI (1906) . . . . **10 C. W. N. 527**

BENGAL TENANCY ACT (VIII OF 1885)—*continued.*

——— **s. 87**—*Transfer—Right of occupancy—Original tenant remaining in possession as sub-tenant of the transferee—Abandonment—Ejectment.*—Where a tenant having a non-transferable right of occupancy sold such right to a third person, obtained a sub-lease from the purchaser and remained in possession of the land and was cultivating the same. *Held*, that the landlord was not entitled to the *khas* possession as against him. *Dina Nath Roy* v. *Krishna Bejoy Saha, 9 C. W. N. 379*; *Sristidhur Biswas* v. *Mudan Sirdar, I. L. R. 9 Calc. 648*, followed. *Kallinath Chakravarti* v. *Upendra Chunder Chowdhry, I. L. R. 24 Calc. 212*, distinguished. In order to entitle a landlord to re-enter on abandonment by the tenant, it must be an abandonment in the words of s. 87 of the Bengal Tenancy Act, namely, that the raiyat voluntarily abandons his residence and ceases to cultivate, without notice to the landlord and without arranging for the payment of his rent as it falls due. *Nurendro Narayan Roy* v. *Ishan Chandra Sen, 22 W. R. 22*, and *Dwarka Nath Misser* v. *Hurrish Chunder, I. L. R. 4 Calc. 925*, referred to. MADAR MONDAL *v.* MAHIMA CHANDRA MAZUMDAR (1906).
I. L. R. 33 Calc. 531

——— **s. 88**—*Sub-division of tenancy—Rent receipts how far evidence of sub-division—Joinder of parties—Wrongly adding a person as a defendant.*—Receipts for rent granted separately by the landlord's tehsildar to the tenants of a holding, whose names were also entered in the landlord's *sherista* in the place of that of the tenant, who held the tenancy before them, does not amount to a consent in writing on the part of the landlord to a sub-division of the tenancy within the meaning of s. 88 of the Bengal Tenancy Act. *Peary Mohan Mukerjee* v. *Gopal Paik, 2 C. W. N. 375*: *s.c. I. L. R. 25 Calc. 531, F. B.*, distinguished. *Jnanendra Mohan Chowdhury* v. *Gopal Dass Chowdhury, 8 C. W. N. 923*: *s. c. I. L. R. 31 Calc. 1026*, applied. *Moharani Beni Pershad Koeri* v. *Goburdhan Koeri, 6 C. W. N. 823*, referred to. BENI PERSHAD KOERI *v.* RAMDAHIN PANDEY (1906).
10 C. W. N. 216
s.c. I. L. R. 33 Calc. 444

——— **s. 95**—*Appointment of a successor to a common manager.*—Having once made an appointment of a common manager under s. 95 of the Bengal Tenancy Act it is not open to the District Judge to appoint a successor to the manager on his resignation. DWARKA NATH MITRA *v.* BANKUTESH LAL MITRA (1905) . . . . **10 C. W. N. 437**

——— **ss. 103A, 103B, 104A, 104J**—*Entry in a record-of-rights—Rebuttable presumption.*—Where in a certain *khewat* finally framed and published under s. 103A (2) of the Bengal Tenancy Act it was stated that certain persons were joint holders of a tenure. *Held*, that the entry was correct until the contrary was proved and that this

BENGAL TENANCY ACT (VIII OF 1885)—*continued.*

presumption was rebutted when it was shown that the tenants had for 60 years separately held possession of their respective plots on payment of separate rents. RAJNARAIN MITRA *v.* ANANTA TARAI (1906). **10 C. W. N. 908**

——— **ss. 103A, 105, 106A, 109A**—*Second appeal—Entry in the khatian by Revenue Officer that no rent fixed—Application for assessment of fair and equitable rent.*—Where in an application by the landlord under s. 105 of the Bengal Tenancy Act for settlement of a fair and equitable rent, the Settlement Officer settled a fair and equitable rent, and the Special Judge on appeal by the tenant confirmed the decision of the Settlement Officer. *Held*, that under s. 109A of the Bengal Tenancy Act, no second appeal lay to the High Court against that decision. RAM BISHEN RAUT *v.* RAJARAM (1906) **I. L. R. 33 Calc. 832**

——— *Rent—Apportionment—Transfer of lessor's interest by operation of law—Transfer of Property Act (IV of 1882), ss. 2 (d), 36.—R* was *hikim* and as such was entitled to certain *mauzas*, which were held by *M* as mortgagee in possession under him. On the 7th Sraban 1307 *Fasli R* ceased to be *hikim* and plaintiff became *hikim* and took possession of the *mauzas* by ousting *M*. *M* had collected from the tenants of the *mauzas* the entire rent for the year 1307, and plaintiff brought this suit for a refund of the rent for the period from the 7th Sraban to the end of the year 1307. *Held*, that s. 36 of the Transfer of Property Act being inapplicable to the case; having regard to s. 2 (*d*) of that Act, the plaintiff's claim was not sustainable. *Satyendra Nath Thakur* v. *Nilkanta Singha, I. L. R. 21 Calc. 383*, and *Lakshminarrappa* v. *Melothraman Nair, I. L. R. 26 Mad. 540*, referred to. MATHEWSON *v.* SUNDER SINHA (1906) **I. L. R. 33 Calc. 786**

——— **ss. 105, 109A, 155, 178 (1)**—*Rent—Second appeal—Case where the existing rent is not varied and the increase of rent is sought for on the ground of increase in area—Whether decision in such a case is a "decision settling a rent."*—The words in sub-s. (3) of s. 109 A of the Bengal Tenancy Act (VIII of 1885, as amended by Act III of 1908), "not being a decision settling a rent," include cases in which the existing rents were not varied and increase of rent was sought for, amongst other grounds, on account of the increase in the area of the holdings. Therefore, where the Special Judge on appeal held that no case was made out for enhancement of rent on the ground of increase in the area of the holdings, no appeal lies against that decision to the High Court. RAMESWAR SINGH *v.* BHUBANESWAR JHA (1906). **I. L. R. 33 Calc. 837**

——— **s. 148 (h)**—*Sale in execution at the instance of assignee of rent decree—Sale in execution of mortgage decree—Rights of purchasers—Superior title.*—A sale held in execution of a decree for arrears of rent on an application by the assignee of the decree, when the landlord's interest in the property itself was not transferred to the assignee, passed no title to the auction-purchaser under cl. (*h*), s. 148 of the Bengal Tenancy Act. A purchaser of the same property at a sale held in execution of a mortgage decree obtained after the first sale acquired a good title as against the first purchaser. GURU CHARAN NATH BEPARI *v.* KARTIK NATH (1905). **10 C. W. N. 44**

——— **ss. 155, 181**—*Ejectment, suit for—Service-tenure—Denial of landlord's title—Notice to quit—Determination of lease—Transfer of Property Act (IV of 1882), ss. 106, 111*—A lessee of a service-tenure incurs a forfeiture of his tenancy by denial of the landlord's title; and the landlord in a suit for ejectment would be entitled to recover judgment, if he did, by some act or other, declare his intention to determine the lease antecedent to the institution of the suit, notice to quit in such a case not being obviously necessary; otherwise the suit should be dismissed. Such a case falls within the Transfer of Property Act, and not under the Bengal Tenancy Act. *Haidri Begam* v. *Nathu, I. L. R. 17 All. 45*, and *Ansar Ali Jemadar* v. *C. E. Grey, 2 C. L. J. 403*, referred to. ANANDAMOYEE *v.* LAKHI CHANDRA MITRA (1906) . **I. L. R. 33 Calc. 339**

——— **s. 167**—*Rent sale—Annulment of mortgage by notice—Right of mortgagee to apply to set aside sale.*—The service of notice under s. 167 of the Bengal Tenancy Act annulling a mortgage is no bar to the mortgagee making an application to set aside a sale of the tenure. BRIJ KUMAR ROY *v.* DHANUKDHARI RAUT (1906) . **10 C. W. N. 976**

——— **s. 170**—*Decree for rent—Execution—Claim under s. 278, Civil Procedure Code (Act XIV of 1882)—Admissibility—Landlord's interest in tenure sold after decree—Decree, if continues to be a first charge on tenure.*—When the plaintiff in a suit for rent is shewn to have been the landlord at the date of the suit and also at the date of the decree, both suit and decree would clearly be a suit and a decree under the Bengal Tenancy Act. As provided in s. 170 of the Bengal Tenancy Act, no claim can be preferred under s. 278, Civil Procedure Code, when such a decree is put in execution. The fact that the plaintiff sold his interest in the tenure subsequently to obtaining the decree, would not prevent him from obtaining the benefit of s. 65 of the Act. *Hem Chunder Bhunjo* v. *Mon Mohini Dassi, 3 C. W. N. 604*, overruled. KHETRA PAL SINGH ROY *v.* KRITARTHAMOYI DASI (1906) . . . **10 C. W. N. 547**
s.c. I. L. R. 33 Calc. 566

——— **s. 170, sub-s. (3)**—*Purchaser of a tenure, right of, to deposit decretal amount—Interest of purchaser void or voidable.*—When a tenure is advertised for sale the purchaser of the tenure has no right to make a deposit under sub-s. (*3*) of s. 170 of the Bengal Tenancy Act and prevent the sale, as he is not a person having an interest in the tenure voidable upon the sale. Where a tenure was advertised for sale and the purchaser of the tenure

BENGAL TENANCY ACT (VIII OF 1885)—*continued.*

from the tenant against whom the decree for rent was obtained was allowed by the lower Court to deposit the decretal amount under sub-s. (3) of s. 170 of the Bengal Tenancy Act to prevent the sale, the High Court on revision did not set aside the order on the ground that on a former occasion under similar circumstances the purchaser had made a similar deposit and the decree-holder had withdrawn the deposit. JOTINDRA MOHAN TAGORE *v.* DURGA DABE (1905) . . **10 C. W. N. 438**

——— **s. 178 (1), cl. (a), s. 173 (3), cl. (a), s. 181.**

See RIGHT OF OCCUPANCY.

——— **s. 178, sub-s. (1), cl (a), sub-s. (3), cl. (a)**—*Contract stipulating re-entry on raiyat's death—Validity—Bengal Act VIII of 1869, s. 7.*—A valid contract of tenancy providing that the tenant, a raiyat, should hold the land for his lifetime, and that the landlord would have the right to re-enter on his death, could be created before the passing of the Bengal Tenancy Act. Such a contract does not come within the terms of the provisions in cl. (*a*), sub-s. (*1*) or cl. (*a*), sub-s. (*3*) of s. 178 of the Bengal Tenancy Act, and is therefore enforcible. The contract in this instance having been created by a *solenamah* in 1877 and the tenant dying in 1902.—*Held*, that the landlord can recover *khas* possession. BAUL CHANDRA CHAKRAVARTI *v.* NISTARINI DEBI (1905).

10 C. W. N. 533
s.c. I. L. R. 33 Calc. 136

——— **s. 182**—*Homestead land of raiyat—Occupancy right.*—It is not required by s. 182 of the Bengal Tenancy Act that a tenant in occupation of homestead land should be a *raiyat* in the village, in which the homestead land is situated, nor is it necessary for him to be the tenant under the same landlord as the landlord of the homestead land. KRIPA NATH CHAKRABUTTY *v.* SHEIKH ANU (1906) . . . . **10 C. W. N. 944**

——— **s. 188**—*Co-sharer landlords—Separate collection of rent—Suit by all the co-sharers for entire rent—Maintainability.*—Where it appeared that some of several co-sharer landlords had been collecting their portion of the rent separately for 25 years, but there was no division of the tenure. *Held*, that there is nothing to prevent the co-sharers from reverting to their original condition, if they are all agreed; and a suit brought by all the co-sharers for the recovery of the entire rent is maintainable. An arrangement under which fractional shares of the rent are paid separately to different co-sharers does not bind the parties for all time, and may be put an end to by the tenants or by the landlords collectively, though not by one of the landlords against the consent of the others. *Guni Mahamad* v. *Moran, I. L. R. 4 Calc. 96; Gopal Chunder Das* v. *Umesh Narain Chowdhury, I. L. R. 17 Calc. 695; Raja Promoda Nath Roy* v. *Raja Ramoni Kanta Roy, 9 C. W. N. 84,*

BENGAL TENANCY ACT (VIII OF 1885)—*concluded.*

referred to. SHYAMA CHARAN BHATTACHARYA *v.* AKHOY KUMAR MITTER (1905).

10 C. W. N. 787

——— **s. 193.**

See JOINDER OF CAUSES OF ACTION.

BEQUEST.

See HINDU LAW.

I. L. R. 33 Calc. 1306

BEQUEST BY WILL.

See STRIDHAN . **I. L. R. 30 Bom. 229**

BEQUEST TO IDOL.

See PROBATE AND ADMINISTRATION ACT s. 3.

BHAOLI.

See SECOND APPEAL.

I. L. R. 33 Calc. 200

BILL OF LADING.

See CONTRACT.

I. L. R. 33 Calc. 547

BILL OF SALE.

See MERCHANT SHIPPING ACT, 57 & 58 VICT. CHAP. 69.

BOARD OF REVENUE.

See SALE.

BOMBAY ACT.

——— **1876—III.**

See MAMLATDARS' COURTS ACT.

——— **1879—V.**

See LAND REVENUE CODE.

——— **1880—I.**

See KHOTI ACT.

——— **1887—IV.**

See GAMBLING.

——— **1888—III.**

See BOMBAY MUNICIPAL ACT.

——— **1888—VI.**

See GUJARAT TALUKDARS' ACT.

——— **1901—III.**

See DISTRICT MUNICIPAL ACT.

——— **1904—I.**

See BOMBAY MUNICIPAL ACT.

BOMBAY CITY MUNICIPAL ACT (BOMBAY ACT III OF 1888).

See DISTRICT MUNICIPAL ACT.

I. L. R. 30 Bom. 400

——— s. 3, cl. (w), (x), and (y), s. 461—*Building bye-laws Nos. 40, 42—Street—Construction.*—The owner of a large plot of ground abutting on a highway divided the plot into 19 small plots and sold them to different purchasers. These plots were mapped out as abutting on the sides of two parallel roads, which were marked out as proposed roads. Each of the purchasers of the plots entered into a covenant with the owner to keep open that portion of the proposed road, which stood in front of his plot and to prepare so much of the road. The question arose whether the proposed road was a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888): *Held*, that the proposed road would constitute a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888). MUNICIPAL COMMISSIONER OF BOMBAY *v.* MATHURABAI (1906).

I. L. R. 30 Bom. 558

——— s. 249—*Place of public resort—Theatre.*—A theatre is a place of public resort and as such falls within the purview of s. 249 of the City of Bombay Municipal Act (Bombay Act III of 1888). EMPEROR *v.* DWARKADAS (1906).

I. L. R. 30 Bom. 392

——— ss. 410 (1), 24, Sch. D. (4)—*Prohibition of sale of fish except in a market—Sale from a basket placed on the Chowpatti foreshore—Sale from a vessel—Private market—Onus of proof—City of Bombay, limits of—Bombay General Clauses Act (Bombay Act I of 1904), s. 3 (10).*—The accused, a fisherwoman, was charged under s. 410 (1) of the Bombay City Municipal Act (Bombay Act III of 1888) with selling or exposing for sale without a license from the Municipal Commissioner fish intended for human food, on the Chowpatti foreshore, in the City of Bombay. The sale was from a basket, which the accused had placed on the sand, at some distance from the water, between the high and low water mark. The fish sold was fresh fish and was brought from one of the boats then in Back Bay. The Presidency Magistrate acquitted the accused on the grounds that (1) the Bombay City Municipal Act did not apply as the place of sale was outside the limits of the City of Bombay as laid down in the City of Bombay Municipal Act; (2) s. 410 of the Act had no application because the place was a private market established from time immemorial; and (3) the sale fell within s. 410 (2) of the Act. On appeal against this order of acquittal, by the Government of Bombay: *Held*, reversing the order of acquittal and convicting the accused, that the accused was not protected by s. 410 (2) of the Bombay City Municipal Act (Bombay Act III of 1888), since it was impossible in the present case to say that the fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel, which was in the water. *Held*, also, that the onus of proving that the place in question was a "private market" lay upon the accused. *Held*, further, that the Bombay City Municipal Act (Bombay Act III of 1888) applied to the spot in question, because it came within the expression "City of Bombay" as defined by the Bombay General Clauses Act (Bombay Act I of 1904). EMPEROR *v.* BUDHOOBAI (1905).

I. L. R. 30 Bom. 126

——— *District Municipal Election Rules, Rule 13—Plaintiff candidate for election as Councillor—Plaintiff's name not published in the list of candidates—Receiving Officer—Suit against Municipality — Declaration — Injunction.* — The plaintiff offered himself as a candidate to be elected a Councillor in the Municipal elections, but his name was not included in the list of candidates published by the Receiving Officer appointed by the Collector under Rule 13 of the District Municipal Election Rules. The plaintiff thereupon brought a suit against the Municipality for a declaration that he was entitled to be elected a Councillor at the elections and for an injunction restraining the Municipality from holding the elections without accepting him as a candidate and without receiving the votes of his voters. The first Court rejected the plaint on the ground that it disclosed no cause of action. On appeal by the plaintiff the Judge reversed the order and remanded the proceedings for decision of the suit according to law. On appeal by the Municipality, *Held*, reversing the order of remand, that the suit for a declaration against the Municipality could not lie because the Municipality neither denied nor was interested to deny the character or right which the plaintiff sought to establish. It was the officer mentioned in Rule 13 of the District Municipal Election Rules that was concerned with that question and over him the Municipality had no control. The claim for an injunction could not be sustained against the Municipality, when it had done no wrong and had proposed to proceed in accordance with the District Municipal Act and the rule, so far as they relate to it. SURAT CITY MUNICIPALITY *v.* CHUNILAL (1906).

I. L. R. 30 Bom. 409

BOMBAY DISTRICT MUNICIPAL ACT (BOMBAY ACT III OF 1901).

BOMBAY GENERAL CLAUSES ACT (BOMBAY ACT I OF 1904).

See BOMBAY CITY MUNICIPAL ACT.

BOMBAY HIGH COURT.

See LETTERS PATENT.

10 C. W. N. 185

See NATIVE STATES.

10 C. W. N. 361

BOMBAY LAND REVENUE CODE (BOMBAY ACT V OF 1879).

——— ss. 56, 57, 153—*Arrears of assessment—Forfeiture by Government—Mortgage—Land in possession of the occupant—Re-grant by*

BOMBAY LAND REVENUE CODE (BOMBAY ACT V OF 1879)—*concluded.*

Government to the occupant—Suit by mortgagee to recover possession—Equities arising out of the conduct of the parties.—Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation. When arrears of assessment are levied by sale, then s. 56 of the Land Revenue Code (Bombay Act V of 1879) in pursuance of an obvious policy, empowers the Collector to sell "freed from all tenures, incumbrances and rights created by the occupant .....or any of his predecessors-in-title or in anywise subsisting against such occupant." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and the subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties. *Balkrishna Vasudev* v. *Madhavrav Narayan, I. L. R. 5 Bom. 73,* followed. AMOLAK BANECHAND *v.* DHONDI (1906) . . . **I. L. R. 30 Bom. 466**

BOMBAY PREVENTION OF GAMBLING ACT (BOMBAY ACT IV OF 1887).

See GAMBLING,
I. L. R. 30 Bom. 348

BONA FIDE PURCHASER FOR VALUE.

See WILL . . **10 C. W. N. 662**

BOND.

See DISQUALIFIED PROPRIETOR.

———— *Guardian and Wards Act (VIII of 1890), ss. 34, 35, 36 and 37—Minor—Guardian—Administration bond passed to Judge—Refusal of the Judge to assign—Appeal.*—No appeal lies from an order passed by the District Judge under s. 35 of the Guardian and Wards Act (VIII of 1890) declining to assign the bond. A bond under s. 34 of the Guardian and Wards Act (VIII of 1890) is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties as may be prescribed, engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form, as given in the schedule of the High Court Circular Orders, which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser or otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events. The District Judge can in his discretion under such circumstances assign such a bond to a proper person. GANPAT *v.* ANNA (1905) . . . . **I. L. R. 30 Bom. 164**

———— *Altering a document—Material alteration.*—Any change in an instrument, which causes it to speak a different language in legal effect, from that which it originally spoke, which changes the legal

BOND—*concluded.*

identity or character of the instrument either in its terms or the relation of the parties to it, is an alteration, which will invalidate it against all parties not consenting to the alteration. It is of no consequence whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. Where after a bond had been executed by the first defendant and delivered to the plaintiff, the name of the second defendant was added as an executant without any authority from him and without the assent of the first defendant. *Held,* that this was such an alteration in the deed as would vitiate it against the first defendant. *Held,* further, that the plaintiff was not entitled to succeed on the basis of the original consideration and to rely on the altered bond as proof of acknowledgment. *Master* v. *Miller, 1 Sm. L. C. 767 (11th Ed.) 2 R. R. 399; Caris* v. *Tattersal, 2 M. and Gr. 890: 10 L. J. C. P. 187; Dodge* v. *Pringle, 29 L. J. Ex. 115; In re Howgate and Osborn's Contract, 1 Ch. 451; Gogun Chunder Ghose* v. *Dhoronidhur Mundul, I. L. R. 7 Calc. 616; Davidson* v. *Cooper, 13 M. and W. 343; 67 R. R. 638; Gardner* v. *Walsh, 5 E. and B. 83; 24 L. J. Q. B. 285; Karaam Ali* v. *Narain Singh, 2 Punjab L. R. 107; Motilal Shaha* v. *Monmohun Goseami, 5 C. W. N. 86; Atmaram* v. *Umedram, I. L. R. 25 Bom. 616; Subrahmania Ayyan* v. *Krishna Ayyan, I. L. R. 23 Mad. 187; Mangal Sen* v. *Shankar Sahai, I. L. R. 25 All. 580; Alderson* v. *Langdale, 3 B. and Ad. 660,* referred to. GOUR CHANDRA DAS *a.* PRASANNA KUMAR CHANDRA (1906) **I. L. R. 33 Calc. 812**
s.c. 10 C. W. N. 788

BREACH OF CONTRACT.

———— *Procuring breach—Knowledge of the contract—Suit for damages.*—In a suit to recover damages for procuring a breach of contract, the plaintiff must establish not merely that the defendant procured the other defendants to commit a breach of contract, but that he did so knowing that there was that contract. PANDURANG *v.* NAGU (1906) . . . **I. L. R. 30 Bom. 598**

BREACH OF THE PEACE.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898).

———— *Dispute concerning land—Criminal Procedure Code (Act V of 1898), s. 145 (1)—Initiatory order—Omission to state therein specific grounds for the apprehension of a likelihood of a breach of the peace—Express reference in the order to a police report containing sufficient grounds for such apprehension—Sufficiency of statement of grounds.*—Where an initiatory order under s. 145 (1) of the Criminal Procedure Code was drawn up in the following terms:—"Whereas it appears from the police report, dated the 23rd January 1905, that there exists a dispute, which is likely to cause a breach of the peace, between the abovenamed parties for the possession of 2 bighas and 18 cottahs in three plots of land . . . it is

BREACH OF THE PEACE—*concluded.*

ordered that the said parties do attend, etc."—and the police report set out sufficient grounds for the apprehension of a likelihood of breach of the peace. *Held*, that the order was not defective, because it was not self-contained and did not state in express terms the grounds upon which the Magistrate was satisfied that a dispute likely to cause a breach of the peace existed, when such grounds appeared in the police report on which the order was founded and to which it made reference in express terms. *Golack Chundra Pal* v. *Kali Charan De, I. L. R. 13 Calc. 175; Dhunput Singh* v. *Chatterput Singh, I. L. R. 20 Calc. 413*, approved of. KHOSH MAHOMED SIRKAR *v.* NAZIR MAHOMED (1906).

I. L. R. 33 Calc. 352

BREACH OF TRUST.

See CRIMINAL PROCEDURE CODE.

I. L. R. 30 Bom. 49

BUILDING.

——— *Deviation—Demolition—Plan—Re-assessment of premises including portion objected to—Prosecution—Magistrate, discretion of—Calcutta Municipal Act (Bengal Act III of 1899)—Jurisdiction of the High Court to set aside the order.*—The petitioner completed certain additions to his premises in August 1902, deviating to some extent from the sanctioned plan and he also erected a cooking-shed at the beginning of 1903 without permission. A part of the premises was re-valued and its assessment increased, in March 1903, in consequence of the improvements made including the deviations. In May 1903 a prosecution was instituted against him in respect of the cooking-shed only, and an order for partial demolition passed in August of the same year. The rest of the premises was re-assessed in September 1904 at a higher rate on account of the improvements. In February 1905 a notice was served on the petitioner to show cause why the additions, which were not in accordance with the sanctioned plan, should not be demolished, and an order was made by the Magistrate in August 1905 directing the demolition of such portion of the premises:—*Held*, that under s. 349 of the Calcutta Municipal Act it is discretionary with the Magistrate to pass an order of demolition or not, and that, under the circumstances of the case, the order was not a fair or proper one and could be set aside by the High Court. ABDUL SAMED *v.* CORPORATION OF CALCUTTA (1905) . **I. L. R. 33 Calc. 287**

BURDEN OF PROOF.

See ACT I OF 1900.

See DEVASTHAN COMMITTEE.

I. L. R. 30 Bom. 508

See EVIDENCE ACT . **10 C. W. N. 33**

See GIFT . . **I. L. R. 30 Bom. 578**

See LANDLORD AND TENANT.

See MAHOMEDAN LAW.

See REVENUE SALE LAW.

10 C. W. N. 137

BURDEN OF PROOF—*concluded.*

——— *Inventions and Designs Act (V of 1888)—Rule issued under s. 30 on respondent—Respondent shewing cause by affidavits—Issue directed to be tried—Onus of proof at trial.*—The applicant obtained a rule under s. 30 of the Inventions and Designs Act, calling upon the respondent to show cause that he had not acquired an exclusive privilege in a certain invention. The respondent showed cause against the rule by affidavits, but the Court, instead of discharging the rule, directed the issue to be tried. *Held*, at the trial, the onus of proof lay on the respondent. IN THE MATTER OF ALEXANDER GRAY (1906) . . . . . **10 C. W. N. 985**

——— *Broker—Want of authority.*—In order to make a broker liable on the ground of want of authority, the onus is upon the plaintiff to affirmatively prove such want of authority. BISSESSUR DASS *v.* JOHANN SMIDT (1906) . **10 C. W. N. 14**

BURNING GHAT.

See GRANT . **I. L. R. 33 Calc. 1290**

——— *Acquisition by Government—Compensation—Respective claims of Municipality and owner of the soil—Dedication of user—Extinction of use—Reverter to owner—Market-value of burning ground—Bengal Municipal Act (Bengal Act III of 1884), s. 30—Construction—"Land"—"Ghat,"—Meaning of.*—An owner of lands may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted, and it is not essential to constitute a valid dedication that legal title should pass from the owner. Nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land, which do not interfere with the uses for which it is dedicated. *Held*, in respect of land, which had not been expressly dedicated, but was used by the public as a burning ground, that the circumstances of the case showed that the owner made a dedication of the user of the property for the purposes of a burning ground, such dedication to remain in force only so long as the property continued to be used as a burning ground. When the sole use to which property had been dedicated becomes impossible of execution by reason of a statutory acquisition and compulsory use for purposes inconsistent with the original dedication it reverts to the dedicator or his representative. Although it is an essential element of a good dedication that it should be irrevocable, nevertheless when, after a valid dedication has been made, the use for which the property is dedicated becomes impossible of execution or the object of the use wholly fails, there is an abandonment in consequence of which the rights of the public therein fail and a reversion takes place, the dedication being taken to have spent its force when the use ceases. *Monmotha Nath* v. *Secretary of State, 1 C. W. N. 698; s. c. L. R. 24 I. A. 177: I. L. R. 25 Calc. 194*, distinguished. Unlike the road-land, which was

BURNING GHAT—*concluded.*

acquired by the Collector in the above case, the burning ground in this case, treated as such, had a market-value, which had been actually assessed. Therefore the person, who was proved to be the owner of the soil, was entitled to the compensation assessed. The word *ghat* in s. 30 of the Bengal Municipal Act does not include a tract of land used as a burning ground. The sub-soil under a *ghat* does not vest in the Municipality under s. 30 of the Bengal Municipal Act; but the *ghat* itself does. The Legislature by enacting s. 30 intended that such roads, etc., as are private property *or* are maintained by Government or at the public expense should not vest in the Municipality. CHAIRMAN, HOWRAH MUNICIPALITY *v.* KHETRA KRISHNA MITTER (1906) . . . **10 C. W. N. 1044**
s.c. I. L. R. 33 Calc. 1290

BUSTEE LAND.

——— **valuation of.**

See CALCUTTA MUNICIPAL ACT, s. 557.
10 C. W. N. 289

BYE-LAWS.

See BOMBAY MUNICIPAL ACT.

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CALCUTTA MUNICIPAL ACT.

See BUILDING . **I. L. R. 33 Calc. 287**

——— **ss. 408 and 574**—*Notice pending litigation.*—Directions given in a notice under s. 408 of the Calcutta Municipal Act (Bengal Act III of 1899) to the owners of property, during the pendency of litigation in respect of that property, cannot be said to be lawfully given, if it is not open to the owners at that time either individually or collectively to alter the property by carrying out the improvements mentioned in the notice. POORNA CHAND BURAL *v.* CORPORATION OF CALCUTTA (1905).
I. L. R. 33 Calc. 699

——— **s. 449**—*Demolition—Deviation from sanctioned plan—Building in existence before sanction—Sanction not relating to such building.*—S. 449 of the Calcutta Municipal Act does not give authority to the Magistrate to direct the demolition of the whole or any part of a building, which was in existence before the sanction was given, but only of a building erected in contravention of the plan submitted to and sanctioned by the Corporation. HYAM *v.* CORPORATION OF CALCUTTA (1906).
I. L. R. 33 Calc. 646

——— **s. 557, cls. (a) and (d)**—*Acquisition of land for Municipality—Market-value, presumption as to—Applicability—"Re-assessment," meaning of—"District," meaning of—Bustee land, valuation of—Owner and tenant's interests.*—The performance by the Chairman of the Corporation of the duties of a Collector under cl. (*a*) of s. 557 of the Calcutta Municipal Act is not a condition precedent to the applicability of the provisions of the other clauses of the section. Where, therefore, land was acquired in Calcutta for the Municipality, but the Chairman did not act as Collector in the proceedings: *Held*, that this would not prevent the application of the presumption under cl. (*d*) of the section that the market-value is 25 times the annual valuation of the property as entered in the assessment book prescribed by the Calcutta Municipal Act. The term "land" as used in s. 557, cl. (*d*), includes "bustee" land. The term "district" as used in the proviso to that section is equivalent to the term "ward." The term "re-assessment" in the same proviso signifies re-valuation and not reimposition of rate or tax. Valuation does not mean merely the amount of the valuation, but covers the whole process or act of valuation. Where, therefore, a substantial part of the act of assessment or valuation was completed before the commencement of the present Act, it cannot be said that there was a re-assessment after the commencement of the Act, merely because the valuation did not become final within the meaning of s. 163, cl. (1), until after the commencement of the Act. *Corporation of Calcutta* v. *Bhupati Roy Chowdhry*, *I. L. R. 26 Calc. 74, 77*, referred to. *Held*, that there has been no re-assessment made after the commencement of the Act for Ward No. X, as the valuation for that ward had been made before the commencement of the Act, though it came into operation on the 1st April 1900 and under s. 7 of the present Act, is to remain in force till the 31st March 1906. Therefore the presumption under s. 557, cl. (*d*), does not arise with reference to land in that ward. In assessing compensation payable to owners of bustee land in Calcutta acquired on behalf of the Municipality: *Held*, that the proper method of valuing such land was to ascertain the value of the land and huts as a whole, and deducting therefrom the value of the huts of which the tenants were the owners, their tenancy (being a tenancy-at-will) having practically no market value. SECRETARY OF STATE FOR INDIA *v.* BELCHAMBERS (1906).
10 C. W. N. 289
s.c. I. L. R. 33 Calc. 396

CANTONMENT PROPERTY.

——— *Grant—Notice of resumption—Offer of compensation—Condition precedent—Notice to one of three executors—Joint occupants.*—A certain plot known as No. 1, Queen's Gardens, situate within the limits of the Poona Cantonment, was in the year 1862 granted by the Commander-in-Chief of the Bombay Army to one Edalji Nasarvanji Colabavala under the terms of a General Order, dated the 31st July 1856. The 14th clause of the said General Order was in these terms:—"Permission to occupy such ground in a military cantonment confers no proprietary right, it continues the property of the State. It is resumable at the pleasure of Government, but in all practicable cases one month's notice

CANTONMENT PROPERTY—*concluded.*

of resumption will be given, and the value of the buildings which may have been erected thereon, as estimated by committee, will be paid to the owner." After the grant the grantee erected a bungalow on the plot, and in the year 1874 sold the bungalow and all his interest in the land to Hari Ravji Chiplunkar, who died in the year 1896 leaving a will under which he appointed defendants Nos. 1–3 as executors. On the 19th October 1903 the Military authorities gave to defendant No. 1 a notice requiring him to deliver possession of the land to the Cantonment Magistrate on the 1st December following. The notice further stated that Government was prepared to pay defendant No. 1 R15,500 as compensation for all the buildings standing on the land, or if the defendant disputed the said amount, then such amount as may be determined by a Committee of Arbitration, and that on defendant's failure to comply with the terms of the notice a suit in ejectment would be filed. The defendants having failed to comply with the notice, the Secretary of State for India in Council brought the present suit in the year 1904 to recover possession of the land, claiming that "there is a right of resumption, which is presently exercisable." Defendants Nos. 1–3 denied the right and contended that the notice of resumption was not proper, and that the plaintiff had no right to resume, the value of the buildings being not estimated by a committee. Defendant No. 4, who was a lessee of defendants Nos. 1—3, expressed his willingness to abide by the orders of the Court as to giving up possession. The Judge having dismissed the suit on the ground that the notice to give up possession was not proper and was not given to the proper parties, the plaintiff appealed. *Held*, reversing the decree, that the General Order stated in terms as clear as possible that no proprietary right was conferred by reason of a permission to occupy the ground, which alone was granted, and that the ground continued the property of the State and was resumable at the pleasure of Government. *Held*, further, that the notice of resumption was not a condition precedent to the right of resumption. Even assuming that notice was a condition precedent, that provision had been satisfied by giving notice to one of the three executors, who were joint occupants. The provision as to notice was nothing more than a statement of what will be done, when practicable, for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve. *Held*, further, that though the value of the buildings erected had not been estimated by a committee, it was not a condition precedent to resumption, though, no doubt, the right to that payment would arise on resumption. *Secretary of State* v. *Jagan Prasad, I. L. R. 6 All. 148*, distinguished. SECRETARY OF STATE FOR INDIA *v.* VAMANARAV (1905) . . . **I. L. R. 30 Bom. 137**

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

——— s. 1—*Act VIII of 1890, s. 17—Hindu Law—Guardian and minor—Right of Hindu mother to be guardian of her infant daughter.*—In the absence of any special reason to the contrary a Hindu mother has a better right to the guardianship of her infant daughter than the infant's paternal grandfather, and this right is not taken away by the fact that the mother has been outcasted. *Kanahi Ram* v. *Biddya Ram, I. L. R. 1 All.*, followed. KAULESRA *v.* JOBAI KASAUNDHAN (1905) . . . **I. L. R. 28 All. 233**

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)—*concluded.*

CATTLE TRESPASS ACT (I OF 1871), ss. 20, 22.

——— ss. 40, 22—*Appeal lies against order made under s. 19 of the Cattle Trespass Act.*—By s. 4 *(o)* of the Code of Criminal Procedure, the word 'offence' includes an act in respect of which a complaint may be made under s. 20 of the Cattle Trespass Act; and a person against whom an order under s. 22 of the Cattle Trespass Act is made is a "person convicted on a trial" and is entitled to appeal under s. 407 of the Code of Criminal Procedure. IN THE MATTER OF PONNUSAMI (1901). **I. L. R. 29 Mad. 517**

CAUSE OF ACTION.

See CIVIL PROCEDURE CODE, s. 26. **10 C. W. N. 503**

See COMPANIES ACT, s. 58. **10 C. W. N. 903**

See LETTERS PATENT. **I. L. R. 28 All. 167**

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 142. **I. L. R. 33 Calc. 821**

See MISJOINDER . **I. L. R. 33 Calc. 367**

See RES JUDICATA. **I. L. R. 33 Calc. 849**

See SECRETARY OF STATE. **I. L. R. 33 Calc. 669**

——— *Slander of title—Cause of action—Damages—Counterfeiting trade-mark—Allegation to the Collector of Customs—Detention of goods in consequence by the Collector—Action of Collector whether a judicial proceeding—Merchandise Marks Act (IV of 1889).*—There were allegations in the plaint (*a*) that the defendants were interested in putting a stop to the sale of goods imported by the plaintiff, (*b*) that when the same were in the Calcutta Customs House, the defendants with intent to injure the plaintiff had falsely alleged to the Collector of Customs that the marks on those goods were an imitation of somebody else's, (*c*) that the defendants had thereby induced the Collector to detain the goods in the Customs House and had also persuaded and induced the Collector to make an *ex parte* order that the plaintiff's marks were a fraudulent imitation and (*d*) that in consequence the plaintiff had suffered special damage. *Held*, that the plaint did disclose a cause of action and should not have been rejected. *Ratcliffe* v. *Evans, L. R. 2 Q. B. 524;*

CAUSE OF ACTION—*concluded.*

White v. *Mellin, (1895) A. C. 154*, referred to. MACLEAN, *C. J.*—This was virtually a case of slander of title, and in order to succeed, the plaintiff had to show that the statements of the defendants were false, malicious, and that he had suffered special damage. Here, though malice had not been specifically pleaded, it was undoubtedly to be implied from the allegations (*a*) and (*b*). In any case, the suit should not have been dismissed on this account, but the plaintiff ought to have been allowed to plead special damage. SALE, *J.*- No question arose in this case as to the legality of the Collector's action. Moreover, the finding of the Collector was not a judicial act and the plaintiff was entitled to disregard it so far as his right to sue in the Civil Court was concerned, and he was not bound to move the higher executive authorities to have the finding set aside. NEMI CHAND *v.* WALLACE (1905).

10 C. W. N. 107

CERTIFICATE.

See APPEAL TO PRIVY COUNCIL.

——— *Public Demands Recovery Act (Bengal Act I of 1895, amended by Bengal Act I of 1897), ss. 7, 15, 17, 19, 20, 31—Sale—Suit—Civil Procedure Code (Act XIV of 1882), s. 244.*—The mere fact that a greater sum is claimed as due in a certificate made under the Public Demands Recovery Act does not render the certificate and notice bad so as to exclude the operation of the rule of limitation laid down in s. 15 of the Act. A certificate can only be modified on such a ground provided that a suit for such purpose is not barred. S. 19 of Bengal Act I of 1895 as amended by Bengal Act I of 1897 makes s. 244 of the Civil Procedure Code applicable to proceedings in execution of a certificate made under the Act. *Ram Taruck Hazra* v. *Dilwur Ali, I. L. R. 29 Calc. 94 (note)*; *Janki Das* v. *Ram Golam Sahu, 6 C. W. N. 331*, and *Ramrup Sahay* v. *Khusal Misser, 6 C. W. N. 650*, distinguished. Where a sale in execution of a certificate is sought to be set aside, not on the ground of invalidity of the proceedings anterior to execution, which are the foundation of the sale, but on the ground of irregularity in the execution proceedings, the judgment-debtor must proceed under s. 20 of the Act, and s. 244 of the Civil Procedure Code bars a separate suit. The procedure prescribed by s. 31 of Act I of 1895 for the service of notice under s. 10 of the Act should be strictly followed. UMED ALI BHUYAN *v.* RAJ LAKSMI DEBYA (1905) . . . **I. L. R. 33 Calc. 84**

CERTIFICATE OF SALE.

See PUBLIC DEMANDS RECOVERY ACT.
10 C. W. N. 130

See SALE . . **10 C. W. N. 969**

CESS ACT.

——— **certificate issued under.**

See SALE . . **10 C. W. N. 969**

CESSES.

See ABWABS . **I. L. R. 33 Calc. 683**

CESTUI QUE TRUST.

See TRUSTEE.

CHARGE.

See MORTGAGE **I. L. R. 33 Calc. 92**

See TRUST . **I. L. R. 28 All. 578**

CHARITABLE SOCIETY.

See ACT XXI OF 1860, s. 20.

CHARITABLE TRUST.

See CIVIL PROCEDURE CODE.

See MAHOMEDAN LAW. **10 C. W. N. 449**

CHARITY, PUBLIC.

See CIVIL PROCEDURE CODE.
I. L. R. 28 All. 603

CHARTER ACT (24 AND 25 VICT., CAP. 104).

——— **s. 14.**

See COPYRIGHT. **I. L. R. 33. Calc. 571**

——— **s. 14.**

See COPYRIGHT ACT, s. 6.
10 C. W. N. 134

See CRIMINAL PROCEDURE CODE.

——— **s. 15.**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 203, 437, 439.
I. L. R. 33 Calc. 1282

——— **s. 15.**

See LETTERS PATENT FOR BOMBAY HIGH COURT, CL. 13 . **10 C. W. N. 185**

See POSSESSION . **I. L. R. 33 Calc. 33**
I. L. R. 33 Calc. 66

——— **s. 15.**

See TRANSFER OF SUIT.
I. L. R. 28 All. 246

CHAUKIDARI CHAKRAN ACT (BENGAL ACT VI OF 1870).

——— **s. 48**—*Transfer of resumed land—Right of zamindar within whose estate lands geographically situate—Right of zamindar with whom settlement made under Reg. VIII of 1793, s. 41.*—S. 48 of Bengal Act VI of 1870 does not require that *chowkidari chakran* lands should be transferred to the zamindar of the estate within which they are geographically situated, but to the zamindar of the estate

CHAUKIDARI CHAKRAN ACT (BENGAL ACT VI OF 1870)—*concluded.*

to which the lands appertain and of which they form a part and parcel. PRATAP NARAIN MUKERJEE *v.* SECRETARY OF STATE FOR INDIA (1906).

10 C. W. N. 637
s.c. I. L. R. 33 Calc. 390

——— s. 50—*Resumption and transfer to zamindar—Chowkidari land, if part of estate—Purchaser of estate at revenue-sale—Title to chowkidari land—Regulation VIII of 1793, s. 41.*—When *chowkidari chakran* land is resumed and transferred to the zamindar under s. 50 of Bengal Act VI of 1870, such land becomes detached from the parent estate, and the zamindar holds it under a different title from his other *malguzari* lands. A purchaser of the parent estate at a revenue sale acquires no title in the resumed *chowkidari* land. S. 41 of Reg. VIII of 1793 has been impliedly repealed in districts or parts of districts to which Bengal Act VI of 1870 has been made applicable. KASHIM SHEIK *v.* PROSUNNO KUMAR MUKERJEE (1906).

10 C. W. N. 598
s.c. I. L. R. 33 Calc. 596

CHAUKIDARI CHAKRAN LAND, SETTLEMENT OF.

——— *Person entitled to settlement—Estate or tenure within which lands are situate—Bengal Act VI of 1870, s. 48.*—Where chaukidari chakran lands had, although situated geographically within the ambit of one estate, been allotted at the time of the permanent settlement to another estate in pursuance of, and in accordance with, the provisions of s. 41 of Regulation VIII of 1793, and were transferred by the Collector in pursuance of Bengal Act VI of 1870. *Held*, that on a true construction of s. 48 of the Act, it is not the geographical situation of the land that is to be looked into, but the transfer is to be made to the zamindar of the estate to which the lands appertain and of which they form a part and parcel. PRATAP NARAIN MUKERJEE *v.* SECRETARY OF STATE FOR INDIA (1906).

I. L. R. 33 Calc. 390
s.c. 10 C. W. N. 637

——— *Resumption by Collector and transfer of land to the proprietor of the estate—Effect of such transfer—Village Chaukidari Act (Bengal Act VI of 1870), ss. 48, 50 and 51—Regulation VIII of 1793, s. 41.*—The effect of resumption of *chaukidari chakran* lands by the Collector of the District under the provisions of Bengal Act VI of 1870, and subsequent transfer of these lands to the proprietor of the estate, is to separate them from the parent estate, and to grant a new title in respect of them to the proprietor of the estate. S. 41 of Regulation VIII of 1793 has been by implication repealed in parts of districts to which Bengal Act VI of 1870 has been made applicable. KASHIM SHEIK *v.* PRASANNA KUMAR MUKERJEE (1906).

I. L. R. 33 Calc. 596
s.c. 10 C. W. N. 598

CHEATING.

——— *Penal Code (Act XLV of 1860), ss. 415, 420—Deception—Dishonesty—"Wrongful loss"—"Wrongful gain."*—The accused by making a false representation that he was an employee of the Calcutta Municipal Corporation obtained rupees ten as subscription from the Health Officer of that Corporation towards the funds of a charitable society. The money was duly made over by the accused to the charity, but he was subsequently charged with the offence of 'cheating' and was convicted under s. 420 of the Penal Code, and sentenced to rigorous imprisonment and fine. *Held*, that the conviction and sentence should be set aside, there being no such deception in this case as to cause "wrongful loss" or "wrongful gain." ASHUTOSH MALLICK *v.* EMPEROR (1905).

I. L. R. 33 Calc. 50

CHITFUND.

See COMPANIES ACT, s. 4.

CHUR.

See POSSESSION . I. L. R. 33 Calc. 33

CHUR LAND.

See LANDLORD AND TENANT.

I. L. R. 33 Calc. 444

CHUTIA NAGPUR ENCUMBERED ESTATES ACT (BENGAL ACT VI OF 1876 AND V OF 1884).

See KHORPOSH GRANT.

I. L. R. 33 Calc. 363

——— s. 3.

See JURISDICTION.

I. L. R. 33 Calc. 1065

——— *Grant by a disqualified proprietor—Ratification.*—An owner of an estate granted a *khorposh* lease in respect of a portion of his estate when such estate was under the management of an officer under the Chota Nagpur Encumbered Estates Act: *Held*, that although he was incompetent to grant such a lease at the time of grant, yet subsequently when he ratified it after the disability ceased, it became a valid grant. ROY *v.* RAM JEWAN (1905).

10 C. W. N. 149
s.c. I. L. R. 33 Calc. 363

CHUTIA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (BENGAL ACT I OF 1879).

See SECOND APPEAL.

I. L. R. 33 Calc. 378
s.c. 10 C. W. N. 28

CIVIL AND REVENUE COURTS.

See ACT IX OF 1872, s. 69.

CIVIL COURT.

See JOINDER OF CAUSES OF ACTION.
I. L. R. 33 Calc. 601

CIVIL COURTS ACT (XII OF 1887).

——— ss. 15, 18 and 19—*Suits Valuation Act (VII of 1887), ss. 9 and 21—Valuation suit—Suit for restitution of conjugal rights—Jurisdiction.*—A suit for restitution of conjugal rights is not a suit which is of necessity excluded from the jurisdiction of a Munsif. The value of such a suit, is, as a rule, the value, which the plaintiff chooses to put upon it, provided that the suit be not unwarrantably undervalued or overvalued from improper motives. *Aklemannessa Bibi* v. *Mahomed Hatem, I. L. R. 31 Calc. 849*, dissented from. *Golam Rahman* v. *Fatima Bibi, I. L. R. 18 Calc. 232, Mowla Newaz* v. *Majid-un-nissa Bibi, I. L. R. 18 Calc. 378, Shire* v. *Shire, 5 Moo. P. C. 81*, and *D'Orliac* v. *D'Orliac, 24 Moo. P. C. 374*, distinguished. *Shedion Ram* v. *Tulshi Ram, I. L. R. 15 All. 378, Jag Lal* v. *Hur Narain Singh, I. L. R. 10 All. 524, Mahabir Singh* v. *Behari Lal, I. L. R. 18 All. 320, Madho Das* v. *Ramji Pathak, I. L. R. 16 All. 286*, and *Lakshman Bhatkar* v. *Babaji Bhatkar, I. L. R. 8 Bom. 31*, referred to. ZAIR HUSAIN KHAN *v.* KHURSHED JAN (1906).
I. L. R. 28 All. 545

——— s. 17—*Jurisdiction—Proceeding in relation to a case—Appeal—Transfer of a district from one judicial division to another.*—Where a certain area is transferred by a Government notification from the jurisdiction of one District Judge, into the jurisdiction of a different District Judge, an appeal preferred after the date on which the notification takes effect must be received and entertained by the District Judge into whose jurisdiction the area from which the appeal comes has been transferred. *Allah Dei Begam* v. *Kesri Mal, I. L. R. 28 All. 93. Semble*, that s. 8 of the Act cannot be applied to the case of a fixed deposit in a bank, such not being a "security" within the meaning of s. 3 (2). GULBAJI KUNWARI *v.* JAGDEO PRASAD (1906) . I. L. R. 28 All. 477

CIVIL PROCEDURE CODE (ACT XIV OF 1882).

See MORTGAGE.
I. L. R. 28 All. 418

——— ss. 2 and 244.

See ACT II OF 1901, ss. 176, 177 AND 193.

——— s. 8.—*Per Curiam.*—The Court of an Additional District Judge is a Court under the District Judge's administrative control and the District Judge is competent to make over to the Additional District Judge an appeal, which he had withdrawn from a Subordinate Judge to whose file it had at first been transferred. *Bidyamoyee Debya Chowdhrani* v. *Surya Kant Acharya, 9 C. W. N. 705 : s. c. I. L. R. 32 Calc. 875*, commented on. RAKHAL CHUNDER TEWARY *v.* SECRETARY OF STATE FOR INDIA (1906) . . . . 10 C. W. N. 841

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— ss. 10, 539—*Public religious trust—Advocate-General, consent of—S. 529 not applicable in case of infringement of an individual right, or as against strangers, alienees from trustee and trespassers—Trustee de son tort—Meaning of phrases "direction of the Court is necessary for the administration," and "such further or other relief" in s. 539—Nature of relief—S. 539 not mandatory or restrictive but enabling, permissive and cumulative—Religious Endowments Act (XX of 1863), s. 14.*—On an application to dismiss a suit on the ground that it was one coming within the purview of s. 539 of the Civil Procedure Code and was not maintainable, the consent of the Advocate-General to its institution not having been previously obtained, *Held*, that to bring a case within the purview of s. 539 of the Civil Procedure Code, the suit must be a representative one brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust upon a cause of action alleging a breach of such trust or necessity for directions as to its administration against a trustee of such express or constructive trust and whether such trustee be so *de jure* or *de son tort* and for the particular relief mentioned. *Subbayya* v. *Krishna, I. L. R. 14 Mad. 186*, followed. *Jugal Kishore* v. *Lakshman Das Raghu Nath Dass, I. L. R. 23 Bom. 659*, referred to. Suits brought not to establish a public right, but to remedy a particular infringement of an individual right are not within the section. *Vishvanath* v. *Rambhat, I. L. R. 15 Bom. 152, Manijan Bibi* v. *Khadem Hossain, I. L. R. 32 Calc. 273, 9 C. W. N. 151, Miya Valiulla* v. *Sayed Bavai, I. L. R. 22 Bom. 496, Naoroji Maneckji* v. *Duster Kharsedji, I. L. R. 28 Bom. 20, Gyana* v. *Kandasami, I. L. R. 10 Mad. 375*, followed. *Jawahra* v. *Akbar Hussain, I. L. R. 7 All. 178, Anandrav* v. *Shankar, I. L. R. 7 Bom. 323, Venkata Chalapati* v. *Subbarayedu, I. L. R. 13 Mad. 293, Kalidas Jivram* v. *Gor Porjaram, I. L. R. 15 Bom. 309, Vengamutha* v. *Pandaveswara, I. L. R. 6 Mad. 151, Subbarayadu* v. *Asanali Sheriff, I. L. R. 23 Mad. 100*, referred to. As against strangers, such as alienees from the trustee and mere trespassers holding adversely to the trust, the section does not apply. *Kazi Hossain* v. *Sagun Balkrishna, I. L. R. 24 Bom. 170, Lakshman Das Parashram* v. *Gunpatrav Krishna, I. L. R. 8 Bom. 365, Sheoratan Kunwari* v. *Ram Pargash, I L. R. 18 All. 227; Hussein Begam* v. *The Collector of Moradabad, I. L. R. 20 All. 46; Budh Sing Dudhuria* v. *Niradbaran Roy, 2 C. L. J. 431; Augustine* v. *Medlycott, I. L. R. 15 Mad. 241; Srinivasa Ayyangar* v. *Srinivasa Swami, I. L. R. 16 Mad. 81; Shri Dhundiraj Ganesh Deb* v. *Ganesh, I. L. R. 18 Bom. 721; Muhammad Abdulla Khan* v. *Kallu, I. L. R. 21 All. 187*, followed. *Sajedur Raja Chowdhury* v. *Gaur Mohon Das Baisnav, I. L. R. 24 Calc. 418*, dissented from. Meaning of the phrases "direction of the Court is necessary for the administration" and "such further or other relief" in s. 539 explained. *Budh Singh Dudhuria* v. *Nirad-*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

baran Roy, 2 C. L. J. 431, and *Jamaluddin* v. *Mujtaba Hussain, I. L. R. 25 All. 681,* followed. S. 539 is not mandatory, but enabling and permissive, cumulative and not restrictive in its effect, and does not affect any right of suit, which may exist independently of it. If therefore a suit is one, which would have been maintainable prior to the enactment of the corresponding section in the Code of 1877, it may now be instituted independently of the provisions of s. 539, even though it be upon such a cause of action and for such relief as is mentioned in it. *Sathappayyar* v. *Periasami, I. L. R. 14 Mad. 1; Thakersey Dewraj* v. *Hurbhum Nursey, I. L. R. 8 Bom. 432; Subbayya* v. *Krishna, I. L. R. 14 Mad. 197; Sajedur Raja Chowdhury* v. *Gaur Mohon Das Baishnav, I. L. R. 24 Calc. 418; Nellaiyappa Pillai* v. *Thangama Nachiyar, I. L. R. 21 Mad. 406,* followed. *Tricum Das Mulj* v. *Khimji Vullabha Dass, I. L. R. 16 Bom. 626; Lutifunnissa Bibi* v. *Narirun Bibi, I. L. R. 11 Calc. 33, Sayad Hossain Mian* v. *Collector of Karia, I. L. R. 21 Bom. 48, Sajedur Raja* v. *Baidyanath Deb, I. L. R. 20 Calc. 397,* dissented from. *Neti Rama Jogiah* v. *Venkatacharulu, I. L. R. 26 Mad. 50,* distinguished. *Kalee Charn* v. *Golabi, 2 C. L. R. 128, Ganapati* v. *Savithri, I. L. R. 21 Mad. 15, Sheoratan Kunwari* v. *Ram Pargash, I. L. R. 18 All. 227, Rangasami* v. *Varadappa, I. L. R. 17 Mad. 465,* and *Raghubardail* v. *Kesho Ramanuj, I. L. R. 11 All. 18,* referred to. Scope and history of the section discussed and explained. BUDREE DAS MUKIM *v.* CHOONI LAL JOHURRY AND OTHERS (1906).

I. L. R. 33 Calc. 788
s.c. 10 C. W. N. 581

——— s. 11—*Right of suit of worshipper—Idol, location of—Religious ceremony.*—A suit not based upon any right to the property in *idols* or to an office, but upon the plaintiff's supposed right as worshipper to insist on the observance of a ceremonial regulation relating to the particular temple, in which the *idol* should be ordinarily located, is not a suit of a civil nature and not maintainable in a Civil Court. LOKE NATH MISRA *v.* DASARATHI TEWARI (1905).

10 C. W. N. 505

——— s. 13.

See ACT XV OF 1877, s. 2, SCH. II, ART. 118.

——— s. 13—*Res judicata.*—To support a plea of *res judicata* it must appear from inspection of the record that the person whose interest it is sought to bind was in some way a party to the suit. A mortgagor of an undivided share may redeem the entirety, if the mortgagee does not object and may be compelled to do so, if required by the mortgagee. Therefore the fact that a suit for redemption of the entire property instituted by such a person was dismissed cannot affect the right of a co-sharer, who was not a party to that suit. In a suit for redemption it was ordered that the mortgagor should recover possession on depositing the mortgage money in the Government Treasury. The money was deposited, but before it could be made over to the mortgagee, the Sepoy Mutiny broke out and the Treasury was looted. *Held,* that the decree having become incapable of execution owing to *vis major,* a fresh suit for redemption was required to give effect to the rights of the parties and do justice between them; and such a suit was not barred under s. 244 of the Civil Procedure Code. CHAUDHURI AHMED BAKSH *v.* SETH RAGHUBER DYAL (1905) . **10 C. W. N. 115**

——— s. 13—*Res judicata in rent suits—Incidental or collateral issues—Adjudication upon title to the land in rent suits, when res judicata in a subsequent title suit.*—Where in a suit for rent, the defendant denies the relationship of landlord and tenant and either sets up the title of a third person to the land for which rent is claimed, or pleads that she is not in occupation of the land or that the tenancy which existed has expired, the only material issue to be decided in the suit is whether the relationship of landlord and tenant subsisted between the parties for the period covered by the suit, and the issue, if any, raised as to the title to the land is an incidental or collateral issue not necessary for the decision of the suit: therefore the adjudication on this latter issue cannot operate as *res judicata* in a subsequent suit between the parties for the establishment of title to the land. *Srihari Banerjee* v. *Khitish Chandra Roy Bahadur, I. L. R. 24 Calc. 569, Run Bahadur* v. *Lucho Koer, I. L. R. 11 Calc. (P. C)* and *Dwarka Nath Roy* v. *Ram Chand Aich, 3 C. W. N. 266* : *s.c. I. L. R. 26 Calc. (F. B.) 428,* referred to. But where in a rent suit, the alleged tenant denies the plaintiff's title to the land and sets up his own title to the same the issue as to the title to the land becomes a substantial issue in the suit, and the decision of the Court on the question of title becomes *res judicata* in a subsequent suit between the parties for establishment of title to the land. *Raj Krissen Mukerjee* v. *Radhamadhab Haldar, 21 W. R. 349, Radhamadhab Haldar* v. *Monohur Mukerjee, I. L. R. 15 Calc. 756;* and *Kasiswar Mukhopadhya* v. *Mohendra Nath Bhandari, I. L. R. 25 Calc. 138,* referred to. Where in a suit brought by the plaintiff against the defendant for rent in respect of an alleged *jama* of R7, the defendant pleaded that he did not hold any separate *jama* of R7 under the plaintiff, but that the lands covered by the suit were included in a *jama* of R33 and odd, which they held under the plaintiff, and the Court held that the defendant did not hold any separate *jama* of R7 under the plaintiff and the lands of the alleged *jama* were included in the defendant's *jama* of R33 odd: *Held,* that the decision that the lands were included within the defendant's *jama* of R33 odd, was not necessary for the decision of the suit, and consequently could not be *res judicata* in a subsequent suit brought by the plaintiff against the defendant for the declaration of his title to those lands and for *khas* possession thereof. SAHADEB DHALI *v* RAM RUDRA HALDAR (1906) . . . . **10 C. W. N. 820**

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— s. 13—*Res judicata—Suit.*—Where after a remand by a higher Court, an issue was raised and accepted by the parties, and the decision became final owing to the abandonment of an appeal, *Quære*—Whether the decision was *res judicata* in a subsequent suit notwithstanding that the raising of the issue on remand in the previous suit might have been open to objection. TIRBHUWAN BAHADUR SINGH *v.* RAMESWAR BAKSH SINGH (1906).

10 C. W. N. 1065
s.c. L. R. 33 I. A. 156
I. L. R. 28 All. 727

——— s. 13—*Res judicata—Two suits decided by same judgment—Appeal in one suit, if barred by decision in the other suit—"Former suit," what is—Hearing two suits together—Irregularity.* A Mahomedan died leaving two widows. Each of them brought a suit for the recovery of her dower from the estate of the husband making the other a party defendant. One of the widows, *M*, having claimed certain houses to be her exclusive property, and the other *J*, denying it, an issue was raised in each of the suits as to whether those houses belonged to the estate of the husband so as to be liable for the dowers claimed or were the separate property of *M*. The two suits were, with the consent of the parties, tried together and decided by one and the same judgment, though two separate decrees were made, the Court holding that the houses were *M*'s separate property. *J* appealed only from the decree in her suit, and it was contended on behalf of *M*, that the judgment in her suit not having been appealed from became final, and was a bar to the trial of the issue as to the ownership of the houses in the appeal preferred by *J* in her suit. *Held per* GHOSH, *C. J.*, agreeing with HARINGTON, *J.* (RAMPINI, *J.*, *contra*).—That there was no separate judgment in *M*'s suit to operate as a bar by way of *res judicata* to the trial of the appeal in *J*'s suit. *Abdul Majid* v. *Jewnarain Mahto, I. L. R. 16 Calc. 238*, relied on. *Balkishan* v. *Kishanlal, I. L. R. 11 All. 148*; *Gururajammah* v. *Venkata Krishnama, I. L. R. 24 Mad. 350*, referred to. The two suits ought not to have been heard together. The proper procedure indicated. MARIAMNESSA BIBEE *v.* JOYNAB BIBEE (1906).

10 C. W. N. 934
s.c. I. L. R. 33 Calc. 1101

——— *One of two joint decree-holders recovering the whole amount liable to the other for his share.*—Although a payment to one of two joint decree-holders of the whole decretal amount does not, even when certified, absolve the judgment-debtor from liability to the other decree-holder such decree-holder is not bound to proceed against the judgment-debtor in execution, but may sue to recover his share from the other decree-holder. SOMASUNDARAM PILLAI *v.* KRISHNASAMY NAIDU (1905).

I. L. R. 29 Mad 183

——— s. 13—*Res judicata must be based on the grounds stated in the judgment.*—A plea of *res judicata* must be based on the grounds of the decision actually stated in the judgment; and where such grounds are unequivocally stated, but do not justify the decision, it is not proper or competent to substitute something else quite different which will justify it to enable one of the parties to found a plea of *res judicata*. JALASUTRAM LAKSHMINARAYAN *v.* BOMMADEVERA VENKATA NARASIMHA NAIDU (1905) . . **I. L. R. 29 Mad. 42**

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— s. 13—*Res judicata—Decrees in cross-suits on same facts—Appeal against one decree only—Decree unappealed no bar to the decision of the appeal.*—Where cross-suits between the same parties on the same facts were tried together and judgment was given on the same day, but separate decrees were passed and an appeal was preferred against one of the decrees alone:—*Held*, that the decree unappealed did not operate as a bar under s. 13 of the Code of Civil Procedure so as to preclude the Appellate Court from dealing with the decree appealed against. The doctrine of *res judicata* has no application when the very object of the appeal, in substance, if not in form, is to get rid of the decision, which is pleaded in bar. *Abdul Majid* v. *Jew Narain Matho, I. L. R. 16 Calc. 238*, followed. PANCHANANDA VELAN *v.* VAITHINATHA SASTRIAL (1905) . . **I. L. R. 29 Mad. 333**

——— s. 13—*Res judicata—'Of competent jurisdiction,' meaning of—Decision against which no second appeal allowed, no bar to suit open to second appeal.*—The words 'of jurisdiction competent' in s. 13 of the Code of Civil Procedure admit of the provisions of law relating to appealability being considered in giving effect to the principle of estoppel, which ought to be so applied that, so far as possible, Courts of higher jurisdiction are not tied down by the decisions of inferior Courts. A decision in a previous suit of a small cause nature, in which no second appeal is allowed by law is no bar to a subsequent suit, in the same Court, which not being of a small cause nature is opened to second appeal. *Subbammal* v. *Huddleston, I. L. R. 17 Mad. 273*, overruled. *Ahmed* v. *Moidin, I. L. R. 24 Mad. 444*, overruled. *Raja Simhadri Appa Row* v. *Ramachandrudu, I. L. R. 27 Mad. 63*, overruled. *Namasivayya Gurukkal* v. *Kadir Ammal, I. L. R. 17 Mad. 161*, followed. *Mussamut Edun* v. *Mussamut Bechun, 8 W. R. 175*, referred to. *Misir Raghobardial* v. *Sheo Baksh Singh, I. L. R. 9 Calc. 439*, referred to. AVANASI GOUNDEN *v.* NACHAMMAL (1905) . . . . **I. L. R. 29 Mad. 195**

——— ss. 13, 102 and 103—*Joint Hindu Family—Partition—Suit for partition dismissed for default—Fresh suit not barred.*—Where a suit for partition was dismissed for default and a fresh suit was instituted,—*Held* that the right to enforce partition is a legal incident of a joint tenancy, and as long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the joint property. *Nasrat-ullah* v. *Mujib-ullah, I. L. R. 13 All. 309*, followed. BISHESHAR DAS *v.* RAM PRASAD (1906).

I. L. R. 28 All. 627

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— **ss. 13, 103, 396**—*Partition suit—Preliminary decree—Execution struck off for default—Fresh suit, if lies.*—A previous suit for partition brought by the plaintiffs having been compromised, an *Amin* was appointed to effect a partition in terms of the compromise. Subsequently the parties not appearing, the execution proceedings then pending were dismissed for default. *Held*, that a fresh suit for partition is not barred by s. 13 or s. 103 of the Civil Procedure Code. *Nasratullah* v. *Mujibullah, I. L. R. 13 All. 309, 313*, followed. *Soni* v. *Munshi, I. L. R., 3 Bom. 94*, distinguished. S. 103 of the Civil Procedure Code has no application to execution proceedings, MADON MOHON MONDUL *v.* BAIKANTA NATH MONDUL (1906).

10 C. W. N. 839

——— **ss. 13, 106**—*Res judicata—Suit dismissed in defendant's absence on plaintiff's failure to adduce evidence—Fresh suit, if barred.*—S. 13 is no bar to a fresh suit, when the previous suit was dismissed in the defendant's absence on the failure of the plaintiff to adduce evidence. *Radha Prasad Singh* v. *Lal Sahab Rai, I. L. R. 13 All. 53*, referred to. DOMA RAM *v.* RAGHU NATH PANDIT (1905) . . . . . **10 C. W. N. 40**

——— **ss. 13, 244, 278, 283**—*Execution of decree—Legal representative of judgment-debtor alleging possession as trustee—Objection—Defence raised in separate suit.*—*Held* that, though a legal representative of a judgment-debtor, who alleges that the property sought to be sold in execution was not the property of the judgment-debtor, but was property possessed by the legal representative as trustee for others, may file an objection under s. 278 of the Code of Civil Procedure, there is nothing to compel the filing of such an objection, and it is open to the legal representative to raise the defence in a subsequent suit brought by the auction-purchaser for possession. *Seth Chand Mal* v. *Durga Dei, I. L. R. 12 All. 133*, and *Syed Ali Sajjad* v. *Bhajan Singh, Weekly Notes, 1906, p. 157*, referred to. INDOMATI *v.* JAGESHAR (1906).

I. L. R. 28 All. 644

——— **ss. 13, 283**—*Order 'in investigation, under s. 283, what is—Payment of decretal amount more than one year after order, effect of—Decision on question of mixed law and fact res judicata—Voluntary payments not recoverable.*—A claim to attached property by *A* was dismissed by the following order:—"The sale seems collusive Claim rejected." The order was apparently made on a consideration of the sale-deed alone and there was nothing to show that any evidence was gone into. More than a year after the order *B*, claiming the properties under a sale by *A* subsequent to the order, paid the decretal amount and the attachment was raised. In a suit by *A* to redeem the lands on the strength of his title under the sale dealt with by the order:—*Held*, that as the order on the claim by *A* purported to be made on the merits, it was valid as one

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

made after 'an investigation' of the claim within the meaning of the word as used in the Code: *Held further*, that the order was conclusive between *A* and the defendants and that the payment of the decree debt by *B*, having been made more than a year after the date of the order did not relieve *A* from the obligation to bring a suit within a year to set aside the order. A judgment in a previous suit between the same parties not based on a misapprehension as to a general rule of law, but deciding a question of mixed law and fact is binding as *res judicata* in a subsequent suit. *Sardhari Lal* v. *Ambika Pershad, I. L. R. 15 Calc. 521*, followed. *Umesh Chunder Roy* v. *Raj Bullubh Sen, I. L. R. 8 Calc. 279*, distinguished. *Krishna Prosad Roy* v. *Bippin Behary Roy, I. L. R. 31 Calc. 228*, distinguished. *Gopal Purshotam* v. *Bai Divali, I. L. R. 18 Bom. 241*, distinguished. *Parthasaradi* v. *Chinna Krishna, I. L. R. 5 Mad. 304 at p. 309*, distinguished. KOYYANA CHITTEMMA *v.* DOOSY GAVARAMMA (1905)

I. L. R. 29 Mad. 225

——— **s. 17, cl. (c)**—*One of the defendants not residing within the jurisdiction of the Court—Leave given after institution of the suit.*—Where one out of three defendants did not reside within the jurisdiction of the Court and leave to sue was given after the institution of the suit, *Held*, that under s. 17, clause (*c*) of the Civil Procedure Code (Act XIV of 1882), it was not necessary that leave of the Court must have been first given. The leave, though subsequent, was good. NARAYAN *v.* SECRETARY OF STATE (1906) . . . **I. L. R. 30 Bom. 570**

——— **ss. 17 and 20**—*Suit against several defendants—Some defendants residing outside the jurisdiction of Court—Objection—Earliest opportunity—Acquiescence in the institution of the suit.*—Plaintiff filed a suit against three defendants in the Court at Sirsi. Defendant 1 lived within the jurisdiction of that Court and defendants 2 and 3 lived within the jurisdiction of the Court at Bársi. Plaintiff did not apply under s. 17 of the Civil Procedure Code (Act XIV of 1882) for leave to sue defendants 2 and 3; on the other hand, these defendants, though they had taken an objection, in their written statement that the Court had no jurisdiction, did not apply under s. 20 of the Code. The Sirsi Court allowed the claim against defendants 2 and 3, who did not reside within its jurisdiction. On appeal by defendant 3 the District Judge set aside the decree on the ground of want of jurisdiction and ordered that the plaint be returned for presentation to the proper Court. The plaintiff having appealed against the said order. *Held*, reversing the order, that defendants 2 and 3 not having made any application under s. 20 of the Civil Procedure Code (Act XIV of 1882), they must be deemed to have acquiesced in the institution of the suit and the suit could not now be said to have been improperly instituted against them in the Sirsi Court. RAMAPPA *v.* GANPAT (1905) . . . **I. L. R. 30 Bom. 81**

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— s. 20.

See s. 8.

——— ss. 22, 23—*Withdrawal by District Judge of a suit—Re-transfer of the same—Powers of District Judge.*—When once the District Judge withdraws a suit to his own file for trial, he is not competent to re-transfer it again to the Court from which the case has been withdrawn. RAMCHARITTAR RAY *v.* BIDHATA RAY (1906).
10 C. W. N. 902

——— ss. 25, 191 (2)—*Transfer by District Judge to his own file of case partly heard by Subordinate Judge—Jurisdiction.*—A District Judge has jurisdiction under s. 25 and s. 191, subs. (2) of the Civil Procedure Code to transfer to his own file a case pending in the Court of a Subordinate Judge, which the latter has already heard in part. *Kishori Mohun Sett* v. *Gul Muhamad Saha, I. L. R. 15 Calc. 177; Palani Sami* v. *Thondama, I. L. R. 26 Mad. 595; Bidyamoyee* v. *Surya Kant Acharya, 9 C. W. N. 705,* referred to. MAHADEO PRASAD SAHU *v.* GAJADHAR PERSAD SAHU (1905) . . . **10 C. W. N. 12**

——— ss. 26, 31—*Misjoinder of causes of action—"Cause of action," meaning of.*—The qualification implied in the words "in respect of the same cause of action" in s. 26, would be satisfied, if the facts, which constituted the infringement of the right of the several plaintiffs, were the same. Where a suit for recovery of possession was brought by four plaintiffs jointly and it was stated that plaintiff No. 4 had purchased a ten annas share of the properties from the other three plaintiffs. *Held,* that the suit was not bad for misjoinder of causes of action. SUNDAR JHA *v.* BANSMAN JHA (1906).
10 C. W. N. 508
s.c. I. L. R. 33 Calc. 367

——— ss. 26, 31, 45, 53.

See MISJOINDER. **I. L. R. 33 Calc. 367**

——— ss. 27 and 53—*Suit instituted by wrong person by mistake—Amendment—Administration—Grant of letters of administration by suppression of will appointing no executors, effect of—Sale by such administrator, effect of—Executors by implication.*—*G,* although he had taken out letters of administration with copy of the will annexed to the estate of a deceased person, instituted a suit in his personal capacity for a declaration that the sale of certain property belonging to the estate, by a person, who had previously obtained grant of letters of administration to the same estate by suppressing the will, such grant having been revoked after the sale was invalid and for a declaration of his own title to the property as devisee. *Held,* that leave should be granted under s. 27 of the Civil Procedure Code to amend the plaint by describing the plaintiff as suing as administrator. S. 7 is applicable to cases where actions have been brought by the wrong person by mistake, whether such mistake is one of law or of fact. *Seshamma* v. *Chennappa, I. L. R. 20 Mad. 467; Duckett* v. *Gover, 6 Ch. D. 82,* referred to. Such amendment is not obnoxious to the proviso in s. 53 of the Civil Procedure Code. The clause in the will providing that "Purusottum Das and Mussammat Binda Bibee shall remain trustees, that is guardians and next friends" makes no appointment of executors either expressly or by implication. *Seshamma* v. *Chennappa, I. L. R. 20 Mad. 467,* referred to. A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void *ab initio* and a sale of property by an administrator, who has obtained a grant of administration under such circumstances to a purchaser, who was ignorant of the suppression of the will, is valid, although the grant was revoked after the sale. The defence of purchase for valuable consideration without notice is available against a claim based on an equitable title though not against one based on a legal title. *Boxall* v. *Boxall, 27 Ch. D. 220,* followed. *Ellis* v. *Ellis, 1 Ch. 613,* referred to. GOPAL DAS AGARWALLAH *v.* BUDREE DASS SUREKA AND ANOTHER (1906).
I. L. R. 33 Calc. 657
s.c. 10 C. W. N. 662

——— s. 28—*Misjoinder of parties—Claim in the alternative against debtors and agent of plaintiff.*—The plaintiff, in a suit to recover money from certain persons alleged to have borrowed money from his agent, is entitled when the alleged debtors deny the loan, to make his agent a co-defendant, and pray for a decree in the alternative against such agent. Such claims are made in respect of the same matter within the meaning of s. 28 of the Code of Civil Procedure. *Muthappa Chetty* v. *Muthu Palani Chetty, I. L. R. 27 Mad. 80,* distinguished. MEYAPPA CHETTI *v.* PERIANNAN CHETTI (1905) . . . . **I. L. R. 29 Mad. 50**

——— ss. 30, 539.

See CAUSE OF ACTION.
I. L. R. 33 Calc. 905

——— ss. 30, 539—*Suit by three persons on behalf of members of a sect—Validity of.*—The plaintiffs, for themselves and members of the Satchasi community of Chatra, instituted a suit to obtain a declaration of their right to take part in the management of the worship of the goddess Sitala celebrated at their village, and to have joint possession with the defendants of two plots of land, on which the worship of the goddess was carried out. Objection was taken that the suit was not maintainable under s. 30 of the Code and that the suit should have been brought under s. 539 of the Code. *Held,* that the requirements of s. 30 of the Code were fully complied with. *Per* WOODROFFE, *J.*—In a case of this nature it is open for two persons to sue with permission under s. 539, or one or more persons to sue on behalf of the rest with permission under s. 30, or for all interested to join in suing. *Rai Badree Dass* v. *Chuni Lall, 10 C. W. N. 581,* followed.

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

Subbaya v. *Krishna, I. L. R. 14 Mad. 186. Sajedur Raja* v. *Baidyanath Deb, I. L. R. 20 Calc. 397, Adamson* v. *Arumugam, I. L. R. 9 Mad. 463,* referred to. A suit may be instituted under s. 30 of the Code on behalf of a defined class of the general public whether all the members of such class are or are not capable of being so accurately ascertained that notices could be, if required, served upon each and all of them. MONMOTHO NATH DAS *v.* HARISH CHANDRA DAS (1906) . **I. L. R. 33 Calc. 905** s.c. **10 C. W. N. 866**

——— **s. 37**—*Meaning of the term "resident"—Powers of a general attorney during a merely temporary absence of his principal.*—The term "resident," as used in s. 37 (*a*) of the Code of Civil Procedure, must be construed liberally. A party "not resident within the local limits of the jurisdiction of the Court" may include a person who, though originally residing within, is temporarily absent from the limits of the Court's jurisdiction. *Ramchandra* v. *Keshav, I. L. R. 6 Bom. 100.* DAMODAR DASS *v.* INAYAT HUSSAIN (1905) **I. L. R. 28 All. 135**

——— **s. 43 and s. 13, Expln. II**—*Suit on one mortgage no bar to subsequent suit on another mortgage of same property.*—A suit brought by *A* against *B* on an alleged mortgage, which was dismissed, is no bar to another suit by *A* against *B* on another mortgage in respect of the same properties under ss. 43 and 13 of the Code of Civil Procedure. *Rangasami Pillai* v. *Krishna Pillai, I. L. R. 22 Mad. 259,* overruled. *Ramaswami Ayyar* v. *Vyithinatha Ayyar, I. L. R. 26 Mad. 760,* followed. *Veerana Pillai* v. *Muthukumara Asary, I. L. R. 27 Mad. 102,* followed. THRIKAIKAT MADATHIL RAMAN *v.* THIRUTHIYIL KRISHNEN NAIR (1905) . . . **I. L. R. 29 Mad. 153**

——— **ss. 43, 373**—*Suit—Omission of part of claim—Withdrawal without leave—Fresh suit for claim omitted, if barred—Leave to withdraw on condition—Non-fulfilment of condition—Effect.*—If a plaintiff withdraws from a suit without the leave of the Court, s. 43 of the Civil Procedure Code is a bar to his instituting a fresh suit in respect of any portion of the claim which he may have omitted to include in his previous suit. The same consequences follow when a plaintiff is allowed to withdraw with liberty to bring a fresh suit on condition of paying the defendants' costs within a certain time and fails to pay such costs within that time. HARE NATH DAS *v.* HOSSAIN ALI (1905). **10 C. W. N. 8**

——— **ss. 44, 45.**

See PARTIES . **I. L. R. 33 Calc. 425**

——— **s. 45.**

See JOINDER OF CAUSES OF ACTION. **I. L. R. 33 Calc. 601**

——— **s. 52**—*Suit—Wrong party.*—S. 27 of the Civil Procedure Code is applicable in cases where by *bonâ fide* mistake, whether of law or fact, actions have been brought in the name of a wrong person. *Seshamma* v. *Chennappa, I. L. R. 20 Mad. 467; Duckett* v. *Gover, 6 Ch. D. 82,* referred to. GOPAL DAS AGARWALA *v.* BUDREE DAS SUREKA (1906) . . . . **10 C. W. N. 662** s.c. **I. L. R. 33 Calc. 657**

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— **ss. 73, 75, 82, 622**—*Substituted service can only be made when defendant keeps out of the way or where the summons cannot be served in the ordinary way.*—Whenever it is practicable, the service of summons must be in person under ss. 73 and 75 of the Code of Civil Procedure; and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service, or that for other reasons it cannot be served in the ordinary way, that substituted service should be ordered. *Subramania Pillai* v. *Subramania Ayyar, I. L. R. 21 Mad. 419,* followed. *Sankaralinga Mudali* v. *Ratnasabhapati Mudali, I. L. R. 21 Mad. 325,* distinguished. ABRAHAM PILLAI *v.* SMITH (1906). **I. L. R. 29 Mad. 324**

——— **s. 80**—*Appeal—Respondent—Service of notice—Failure to carry out the requirements of the Code (Act XIV of 1882).*—A bailiff, who was deputed to serve notice of an appeal on the respondent, affixed a copy of the notice on the outer door of the respondent's house under s. 80 of the Civil Procedure Code (Act XIV of 1882), and reported as follows—"The respondent was not found, his adult undivided son having refused to receive copy of the notice, it was affixed to the front door of his house." *Held,* that the service of the notice was not proper. The report was merely a statement that the respondent could not be found and the serving officer was not shown to have carried out the requirements of the Civil Procedure Code (Act XIV of 1882). *Rajendro Nath Sanyal* v. *Jan Meah, I. L. R. 26 Calc. 101,* and *Sakina* v. *Gauri Sahai, I. L. R. 24 All. 302,* referred to. SAKHARAM *v.* PADMAKAR (1906). **I. L. R. 30 Bom. 623**

——— **s. 99A**—*Suit for profits—Previous suit dismissed, because one of the defendants not summoned.*—A suit for profits for the years 1301 and 1302 Fasli, brought by the present plaintiffs against the appellant and two other defendants, was dismissed owing to the plaintiff's failure to cause one of the defendants to be summoned. The plaintiffs now sued the same defendants for profits for the years 1302, 1303 and 1304 Fasli. *Held,* that it was open to the plaintiffs, subject to the law of limitation, to bring the present suit and that the case was governed by the principle embodied in s. 99A of the Code of Civil Procedure. SITA RAM SINGH *v.* POKHPAL SINGH (1906) . **I. L. R. 28 All. 749**

——— **ss. 102, 103**—*Land Acquisition Act (I of 1894), ss. 12, 18, 31, 53—Apportionment—Reference to Court—Dismissal for default—Fresh suit, if maintainable—Rights of persons not parties to the reference—Construction of*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

Statute—Special jurisdiction.—Certain persons, who were parties in a land acquisition proceeding, being dissatisfied with the apportionment of the compensation money made by the Collector, obtained a reference to the Court under s. 18 of the Land Acquisition Act, but as they did not appear at the hearing of the same it was struck off. *Held*, that a suit instituted by the same persons in the Civil Court for the apportionment of the compensation money was barred by ss. 102 and 103, Civil Procedure Code. Ss. 102 and 103, Civil Procedure Code, applies to proceedings before the Court to which a reference is made under s. 18 of the Land Acquisition Act, owing to the operation of s. 647, Civil Procedure Code, which is made applicable to such proceedings by s. 53 of the Land Acquisition Act. Persons, who were not parties in the land acquisition proceeding, were not debarred from instituting a suit for apportionment in the Civil Court. STEPHEN, *J.*—*Quære*—Whether persons who were before the Collector, but not before the Court to which reference was made under s. 18, Land Acquisition Act, would be debarred from instituting such a suit. MUKERJEE, *J.*—An objection as to the measurement of the land or the amount of the compensation payable therefor must be determined exclusively by a reference to the Civil Court under s. 18, cl. (1) of the Land Acquisition Act. But a question as to the persons to whom compensation is payable or its apportionment among the persons interested may be determined either under a reference as contemplated by s. 18, cl. (1) of the Act or by a suit at the instance of a person lawfully entitled to it as against another, who has drawn the compensation money. When, however, a party has once availed himself of a reference to the Court under s. 18, Land Acquisition Act, he cannot again ask for an opportunity to litigate the same matter in the ordinary Court. *Sri Punnabati Dai* v. *Padmanund Singh, 7 C. W. N. 533; Raja Nilmoni Sing* v. *Ram Bandhu Rai, I. L. R. 7 Calc. 388 at p. 393; Hurmut Jan Bibi* v. *Padma Lochun, I. L. R. 12 Calc. 33*, referred to. BHANDI SINGH *v.* RAMADHIN ROY (1905) . . **10 C. W. N. 991**

——— **ss. 111, 146, 561, 566**—*Suit for relief inconsistent with order—Set-off claimed in written statement—Omission to frame issue—Company—Liquidation—Companies Act (VI of 1882), ss. 149, 214—Meaning of "legally recoverable".*—*Held*, that it was essential to the right decision of the suit, that appropriate issues should be framed and tried with a view to determining the validity of Lakshmishanker's claim to set off the R57,930. On issues having been framed and sent down for trial, the lower Court found that Lakshmishanker had lent the moneys referred to in his written statement and held that he was entitled to set off the same as against the sum of R41,891-2-0 for which the Appellate Court had held him liable. The plaintiff appealed. *Held*, that s. 111 of the Civil Procedure Code applied and that the amount due to Lakshmishanker must be set off against the plaintiff Company's demand. *Ince Hall Rolling Mills Company* v. *Douglas Forge Company, 8 Q. B. D. 179*, and *Ex parte Pelly, 21 Ch. D. 492*, distinguished *Per* JENKINS, *C.J.*—In my opinion the words legally recoverable in s. 111 of the Civil Procedure Code, 1882, have no reference to the ability of the debtor to pay the demand in full: and a sum is legally recoverable though in the result the creditor must be satisfied with a dividend. AHMEDABAD ADVANCE SPINNING AND WEAVING COMPANY *v.* LAKSHMISHANKER (1904)

I. L. R. 30 Bom. 173

——— **s. 198**—*Judgment to be pronounced in open Court or on some future day—Notice to the parties or their pleaders-or recognized agents—Practice in the Mofussil Courts strongly disapproved of.*—S. 198 of the Civil Procedure Code (Act XIV of 1822) provides that "the Court, after evidence has been duly taken and the parties have been duly heard either in person or by their respective pleaders or recognized agents, shall pronounce judgment in open Court either at once or on some future day, of which due notice shall be given to the parties or their pleaders." Failure to observe the provisions of s. 198 of the Civil Procedure Code (Act XIV of 1882), and the not uncommon practice in the Mofussil Courts to omit to pronounce judgment in open Court, strongly disapproved of. BAI DAHI *v.* HARGOVANDAS (1906).

I. L. R. 30 Bom. 455

——— **s. 199**—*Suit against a Magistrate to recover damages—Judgment written by a Judge after his transfer.*—An objection having been raised to the legality of a judgment on the ground that the Judge wrote it after he had been transferred. *Held*, that s. 199 of the Civil Procedure Code (Act XIV of 1882) furnished a complete answer. GIRJASHANKAR *v.* GOPALJI (1905) . . **I. L. R. 30 Bom. 241**

——— **ss. 209, 211, 212.**

See COURT FEES ACT (VII OF 1870), s. 11.

I. L. R. 33 Calc. 1232

——— **ss. 211, 559.**

See MESNE PROFITS.

I. L. R. 33 Calc. 329

——— **s. 211**—*Court-fees—Set-off claimed in a written statement.*—Where in a suit for rent the question was as to whether defendant was entitled to claim a deduction on account of payment made by him for cesses payable by the plaintiff on account of years previous to those for which rent was claimed. *Held*, that the payment cannot be treated as part payment of the rents sued for, but as an antecedent debt. The claim was, therefore, in the nature of a set-off and Court-fees must be paid for the same. *Dictum of* BANERJEE, *J.*, in *Fakir Chandra Dutta* v. *Messrs. Gisborne & Co., 8 C. W. N. 174*, not followed. GUISH *v.* ANANTA RAM RATHI (1905) . . **10 C. W. N. 199**

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— **ss. 223, 311, 312.**

See PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT I OF 1895), s. 21.

——— **ss. 230, 269, 272, 295, 489, 490.**

See ATTACHMENT BEFORE JUDGMENT.
I. L. R. 33 Calc. 639

ss. 230, 269, 272, 295, 439, 486, 490—*Attachment before judgment, effect of—Realization in execution—Priority—S. 490, effect of.*—The object and effect of an attachment before judgment is simply to safeguard the property attached so as to enable the plaintiff to realise the amount of his decree, if he should get one. Though he has a security he has no charge on the property, which remains that of the defendant available for other decree-holders. Nor does a decree following such attachment constitute a plaintiff a secured creditor, but the latter must, as any other creditor, apply for execution from which application he is not exempted by s. 490 of the Civil Procedure Code. In short, a plaintiff decree-holder, who has attached, before judgment, has not by reason of such attachment or process incidental thereto any right to be treated preferentially to other judgment-creditors. There must be realization in execution to give right of priority. *Pallongi* v. *Jordan, I. L. R. 12 Bom. 400*, referred to. SEWDUTT ROY *v.* SREE CANTO MAITY (1906) . . . **10 C. W. N. 634**
s.c. I. L. R. 33 Calc. 639

——— **s. 231**—*Act V of 1881, s. 92—Execution of decree—One of several joint decree-holders not competent to give a discharge for the full amount of the decree—Executors.*—*Held*, that one out of several joint decree-holders is not competent to give a valid discharge for the amount of the joint decree, and his position in this respect is not affected by the fact that he and his fellow-decree-holders are co-executors. *Tamman Singh* v. *Lachmin Kunwari, I. L. R. 26 All. 318*, and *Moti Ram* v. *Hannu Prasad, I. L. R. 26 All. 334*, followed. LACHMAN DAS *v.* CHATURBHUJ DAS (1905).
I. L. R. 28 All. 252

——— **ss. 231, 260.**

See DECREE . **I. L. R. 33 Calc. 306**

——— **ss. 231, 235, 260**—*Perpetual injunction—Wilful disobedience—Application for execution—Notice to judgment-debtor, if obligatory—Notice to absent decree-holder—Prayer—Relief.*—On the 30th March 1889, two persons *D* and *N* obtained a decree for a perpetual injunction restraining the defendant from erecting pucca buildings on a parcel of land. On the 16th March 1904, *D* applied for execution of the decree against one of the judgment-debtors, who had erected a pucca building on the 17th and the 18th February 1904 and the only relief asked for was the demolition of the building. The lower Courts ordered, under s. 260 of the Civil Procedure Code, for the attachment of the judgment-debtor's property for one year. *Held*, that no notice to the judgment-debtor calling upon him to obey the decree was necessary under s. 260 of the Civil Procedure Code. That the lower Courts were right in allowing the decree-holder to execute his decree by attachment, although he had applied merely for the demolition of the house. The serving of a notice on the judgment-debtor, when a decree-holder asks for relief under s. 260 of the Civil Procedure Code, is left to the discretion of the Court in consideration of the circumstances of each case. The judgment-debtor in this case having acted deliberately in defiance of the Court's order could not claim to be allowed an opportunity to undo what he had done. *Per* MOOKERJEE, *J.*—Where there is no possibility of the absent decree-holder being prejudiced by reason of an order for execution made on the application of the other decree-holder, it is not obligatory upon the Court to issue a notice upon him. DURGA DAS NANDI *v.* DEORAJ AGARWALA (1905).
10 C. W. N. 297
s.c. I. L. R. 33 Calc. 306

——— **s. 232**—*Execution of decree—Order allowed to become final—Subsequent regular suit.*—*Held*, that no suit will lie to establish a right to execute a decree when an order dismissing an application under s. 232 of the Civil Procedure Code has been allowed to become final. *Budhan Singh* v. *Saliq Ram, 1 A. L. J. R., p. 61*, approved. *Sheoraj Singh* v. *Amin-uddin Khan, I. L. R. 20 All. 539*, distinguished. AMANAT-ULLAH KHAN *v.* SARDHA PRASAD (1906) . . . **I. L. R. 28 All. 613**

——— **s. 234.**

See HINDU LAW . **I. L. R. 33 Calc. 676**

——— **ss. 237 and 578**—*Execution of decree—Application for attachment—Omission to verify inventory of property sought to be attached—Irregularity.*—*Held*, that the omission in an application in execution for attachment of immoveable property to verify the inventory of the property sought to be attached in the manner prescribed by s. 237 of the Code of Civil Procedure is an irregularity only and does not vitiate the application. *Basdeo* v. *John Smidt, I. L. R. 22 All. 55*, followed. NASIR-UN-NISSA *v.* GHAFUR-UD-DIN (1905) . **I. L. R. 28 All. 244**

——— **s. 244.**

See CERTIFICATE **I. L. R. 33 Calc. 84**

——— **s. 244.**

See SALE . . **I. L. R. 33 Calc. 283**

——— **s. 244**—*Execution of decree—Death of judgment-debtor pending execution proceedings—Questions arising between representatives of judgment-debtor and decree-holder.*—Where a judgment-debtor died after the passing of a decree and his legal representatives are brought on the record in execution proceedings to represent him in respect to the decree, questions which they raise as to property which they say does not belong to his assets in their

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

hands, and as such is not capable of being taken in execution, are questions which, under s. 244 of the Code of Civil Procedure, must be determined in the execution department and not by separate suit. *Seth Chand Mal* v. *Durga Dei, I. L. R. 12 All. 313,* and *Punchanun Bundopadhya* v. *Rabia Bibi, I. L. R. 17 Calc. 711,* followed. KALI CHARAN v. JEWAT DUBE (1905) . . . **I. L. R. 28 All. 51**

——— s. 244—*Representative of judgment-debtor—Rent-decree against recorded tenant—Transferee of portion of occupancy holding before decree.*—Where the landlord of an occupancy holding obtains a decree for rent against his recorded tenant, an unregistered transferee of the tenant, into whose hands a portion of the holding had previously passed, is bound by the decree and is therefore a representative of the judgment-debtor within the meaning of s. 244 of the Civil Procedure Code. *Principle of Full Bench case—Ishan Chandra Sirkar* v. *Beni Madhub Sarkar, I. L. R. 24 Calc. 62,* applied. *Azgar Ali* v. *Asaboddin Kazi, 9 C. W. N. 134,* followed. GOPI NATH CHATTOPADHYA v. SAJANI KANTA SINGH (1905).

10 C. W. N. 240

——— s. 244—*Madras Salt Act (IV of 1889), ss. 16 (a), 18 and 27—No compensation under s. 18 when license cancelled under s. 27.*—Where a license has been cancelled under s. 27 of the Madras Salt Act IV of 1889, the licensee is not entitled to compensation under s. 18 of the Act, but only to the value of the proprietary right under s. 18 (*a*) of the Act. Where such licensee has obtained a decree for possession of saltpans in default of payment of proper compensation, it is competent to the Court in execution proceedings to determine the amount so payable; and no separate suit need be brought to determine such amount. COLLECTOR OF CHINGLEPUT FOR THE SECRETARY OF STATE FOR INDIA v. SUBRAYA MUDALIAR (1905).

I. L. R. 29 Mad. 181

——— s. 244 (c)—*Application to set aside sale on the ground of fraud—Previous suit with similar object dismissed—Procedure—Estoppel.*—S. 141 (*c*) of the Civil Procedure Code governs a case in which a person seeks to set aside an auction sale on the ground of fraud and on the ground that the decree-holder himself held a mortgage on the property brought to sale. This plea had been urged successfully by the appellant in a regular suit brought by the present respondent, but the former now pleaded that the remedy should be by suit and not by execution proceedings. *Per* AIKMAN, *J.*—The appellant cannot be allowed to go behind the issue decided in the course of the previous litigation. GAYA PRASAD MISR v. RANDHIR SINGH (1906).

I. L. R. 28 All. 681

——— ss. 244, 246—*Person attaching decree representative of decree-holder under s. 244—Decree directing sale of property for money due is a decree for money within the meaning of s. 246.*—One, who attaches a decree, is a representative of the decree-holder for the purposes of s. 244 of the Code of Civil Procedure and an appeal lies from orders in execution proceedings disposing of questions arising between him and the judgment-debtor, relating to the execution of the decree. *Sah Mandlull* v. *Kanagasabapathi, I. L. R. 16 Mad. 20,* followed. A decree directing the plaintiff to recover the decreed amount by sale of properties, but not directing payment by the defendant is essentially a decree for money. The provisions as to set off, in s. 246 of the Code of Civil Procedure, will apply to such decrees. *Vaidhinathasamy Ayyar* v. *Somasundaram Pillai, I. L. R. 28 Mad. 476,* followed. KRISHNAN v. VENKATAPATHI CHETTY (1905).

I. L. R. 29 Mad. 318

——— ss. 244, 273, 311—*Sale, setting aside—Irregularity—Jurisdiction.*—When a Court, in which an application for execution was pending, received an order from another Court under s. 273 of the Civil Procedure Code, for attaching the decree and returned the order with an intimation that it did not contain information as to the amount of the decree and subsequently held the sale. *Held,* that the sale was invalid and was accordingly set aside. That it was not a mere irregularity as the Court had no jurisdiction to hold the sale. MANIK LAL SEAL v. BONOMALI MUKERJEE (1905) **10 C. W. N. 193**

——— ss. 244 and 311—*Execution of decree—Property sold as non-ancestral after inquiry by Court and notice to judgment-debtors—Plea that property was in fact ancestral barred.*—Where after an inquiry as to the nature of the property, of which the judgment-debtors had notice, a Court in execution of a decree caused certain immoveable property to be sold by auction as non-ancestral, the judgment-debtors standing by and neglecting to supply the Court with any information as to the nature of the property sold, it was *held* that it was not competent to the judgment-debtors subsequently to seek to have the sale set aside upon the ground that the property was ancestral and ought to have been dealt with in the manner provided by law in respect of such property. *Shirin Begam* v. *Agha Ali Khan, I. L. R. 18 All. 141,* followed. *Arunachellam Chetti* v. *Arunachellam Chetti, L. R. 15 I. A. 171,* referred to. *Sukhdeo Rai* v. *Sheo Ghulam, I. L. R. 4 All. 382,* not followed. BEHARI SINGH v. MUKAT SINGH (1905) . **I. L. R. 28 All. 273**

——— ss. 244, 318—*Purchaser of undivided share must sue for partition by separate suit—S. 244 no bar to such suit.*—The purchaser at a Court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member. The Court cannot on a mere application for execution by such purchaser enforce his right by an order for partition. No such order can be made under s. 318 of the Code of Civil Procedure and the dismissal by the Court of an application by the purchaser under s. 318 cannot

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

be a bar to a suit by the purchaser for partition. S. 244 of the Code of Civil Procedure is no bar to such suit. YELUMALAI CHETTI *v.* SRINIVASA CHETTI (1906) . . . . . **I. L. R. 29 Mad. 294**

——— **ss. 244 and 583**—*Execution of decree—Review of judgment—Recovery of mesne profits for period between decree of High Court in appeal and decree in review—Separate suit—Application in execution.*—Where *M. D.*, defendant in a partition suit, was deprived by the High Court of a house allotted to him by the first Court and subsequently the High Court acting under Chapter XLVII of the Code of Civil Procedure set aside its decree and *M. D.*, having recovered possession of the house, applied under s. 583 of the Code for mesne profits, *held* that s. 583 had no application, the order entitling *M. D.* to restitution having been passed under Chapter XLVII, and not in appeal under Chapter XLI. *Held*, further, that it was not necessary for *M.D.* to bring a separate suit, that one of his remedies was by "summary process," *i.e.*, by an application under s. 244, and that the present application might be deemed to be one under that section. *Shama Purshad Roy Chowdhry* v. *Hurro Purshad Roy Chowdhry*, *10 Moo. I. A. 203*, referred to. *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia*, *9 W. R. 402*, *Saran* v. *Bhagwan*, *I. L. R. 25 All. 441*, and *Harnam Chandra* v. *Muhammad Yar Khan*, *I. L. R. 27 All. 485*, followed. *Semble*, that that lower Court would have an inherent right to order restitution of what had been declared to have been improperly taken. *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah*, *I. L. R. 14 Calc. 484*, and *Raja Singh* v. *Kooldip Singh*, *I. L. R. 21 Calc. 989*, referred to. *Held*, also, that the applicant having been guilty of gross laches in not applying for review for many years should get mesne profits only from the date of the High Court's decree in review. COLLECTOR OF MEERUT *v.* KALKA PRASAD (1906).

I. L. R. 28 All. 665

——— **ss. 244, 583**—*Execution, pending appeal, of decree reversed on appeal—Restitution—Right to claim restitution—Party—Representative—Transferee of decree passed on appeal—Decree—Execution.*—S. 583 of the Code of Civil Procedure must be read with s. 244 of the Code, and under the conjoint operation of the two sections, the assignee of the decree of the Appellate Court, which reversed the decree appealed against, being the representative within the meaning of s. 244 of the party, in whose favour the appellate decree is passed, is entitled to obtain restitution by applying for execution of the appellate decree. JAMINI NATH ROY *v.* DHARMA DAS SUR (1906).

I. L. R. 33 Calc. 857

——— **ss. 244, 622**—*Execution of decree—Question not relating to the execution of the decree—Appeal—Revision—Practice—Exercise of High Court's revisional jurisdiction.*—The plaintiff in a suit for an injunction obtained a decree prohibiting the defendant from obstructing him in building within a certain area, and also giving costs. This decree was executed for the cases awarded. Subsequently the judgment-debtor applied to the executing Court, asking that the decree-holder should be ordered to demolish certain structures, which he had erected beyond the limits prescribed by the decree, and obtained an order as prayed. *Held*, that no appeal would lie from such an order. *Held*, also, that the High Court is competent, of its own motion, to call for the record of a civil case and pass such orders as it thinks fit, and the exercise of its powers of revision on the civil side will not invariably (though such is ordinarily the case) be confined to matters in respect of which no other remedy is opened to the party aggrieved. *Mahomed Foyez Chowdhry* v. *Goluck Dass*, *7 C. L. R. 191*, distinguished. *The Secretary of State for India in Council* v. *Jillo*, *I. L. R. 21 All. 133*, and *Guise* v. *Jairaj*, *I. L. R. 15 All. 405*, referred to. DEBI DAS *v.* EJAZ HUSSAIN (1905).

I. L. R. 28 All. 72

——— **s. 253**—*Decree against surety—Execution against surety—Practice and Procedure.*—The provisions of s. 253 of the Civil Procedure Code (Act XIV of 1882) do not permit the execution of a decree against the surety, who has become liable for the performance of the decree passed prior to his entering into the obligation. *Venkapa Naik* v. *Basalingapa*, *I. L. R. 12 Bom. 411*, explained. LAKSHMAN *v.* GOPAL (1906).

I. L. R. 30 Bom. 506

——— **s. 258**—*Uncertified judgment cannot be taken notice of by Court.*—An adjustment of a decree out of Court, which is not certified to the Court cannot, under s. 258 of the Code of Civil Procedure, be pleaded as a bar to execution. *Paritambi Udayan* v. *Vellaya Goundan*, *I. L. R. 21 Mad. 409*, followed. *Ramayyar* v. *Ramayyar*, *I. L. R. 21 Mad. 356*, referred to. GANAPATHY AYYAR *v.* CHENGA REDDI (1905).

I. L. R. 29 Mad. 312

——— **ss. 258, 462**—*Adjustment of decree by guardian without leave under s. 462 cannot be certified under s. 258 of the Civil Procedure Code.*—The provisions of s. 462 of the Code of Civil Procedure apply to compromises after decree and no adjustment by compromise of a decree by the guardian of a minor can be certified under s. 258 of the Code of Civil Procedure when the guardian had not applied for leave to enter into the compromise under s. 462 of the Code. ARUNACHELLAM CHETTY *v.* RAMANADHAN CHETTY (1905).

I. L. R. 29 Mad. 309

——— **s. 260**—*Decree for perpetual injunction, execution of—Limitation Act (XV of 1877), Sch. II, Art. 178—Application in time if within three years of breach complained of—Court executing decree, powers of—Cannot go behind decree.*—Where a perpetual injunction has been granted, on each successive breach of it the decree

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

may be enforced under s. 260 of the Code of Civil Procedure by an application made within three years of such breach under Art. 178, Sch. II of the Limitation Act. The decree-holder is not bound to take action in respect of every petty infringement, and the injunction does not by his inaction become inoperative after three years from the date of the first petty breach so as to disentitle him to take action where a serious breach is afterwards committed. Where the terms of a decree are clear, the executing Court is bound to give effect to it and cannot read into it limitations gathered from a reference to the records of the suit. VENKATACHALLAM CHETTY *v.* VEERAPPA PILLAI (1905).

I. L. R. 29 Mad. 314

——— **ss. 264, 411**—*Court-fees—Civil Procedure Code (Act VIII of 1859), s. 309—Suit in formâ pauperis—Successful petitioner—Charge by Government for Court-fees—Crown debt, priority of.*—The plaintiff instituted a suit in *formâ pauperis* against the defendant and obtained a decree. The decree directed that the property in suit should be conveyed to the plaintiff, and the taxing officer was to certify the amount of Court-fees that would have been payable by the plaintiff, had she not sued in *formâ pauperis*, and to tax the plaintiff's other costs of suit. It was also ordered and decreed that the defendants should pay the amount of Court-fees to be certified by the Government Solicitor, which should form a first charge on the property conveyed. Thereafter the plaintiff applied for attachment of other premises belonging to the defendants and obtained an order for sale. The sale-proceeds were ordered to be paid into Court, which amounted to R999-1-8. The plaintiff's attorney then without notice to the Government Solicitor or defendants made an application for payment to him of the amounts realised in execution from the defendants. The Government Solicitor then presented a petition asking that the amount of Court-fees certified as due and payable by the defendant to the Government Solicitor in terms of the decree be paid in the first instance and in precedence to all claims. *Held*, that Court-fees form a Crown debt and under ordinary circumstances the principle would apply that the Crown would be entitled to precedence in payment of this debt over all creditors *The Secretary of State* v. *The Bombay Landing and Shipping Company, Ld., 5 Bom. H. C. (O. C. J.) 23, Gunput Pataya* v. *The Collector of Kanara, I. L. R. 1 Bom. 7*, referred to. S. 411 of the Civil Procedure Code is an enabling section, and though it indicates the manner in which the Crown may proceed to realise the debt, it does not preclude the Crown or its representatives from urging its prerogative and insisting on its rights to precedence over all other creditors. *Gulzari Lal* v. *Collector of Bareilly, I. L. R. 1 All. 1596; The Collector of Moradabad* v. *Muhammad Daim, I. L. R. 2 All. 196; Ramdas* v. *The Secretary of State, I. L. R. 18 All. 419*; and *Bell* v. *The Municipal Commissioner, I. L. R. 26 Mad. 457*. The Government Solicitor is entitled to precedence over all creditors and it is not necessary for him to attach the fund before claiming payment. GAYANODA BALA DASSEE *v.* BUTTO KRISTO BAIRAGEE AND OTHERS (1906).

I. L. R. 33 Calc. 1040
s.c. 10 C. W. N. 857

——— **s. 266**—*Attachment—Annuity—Future maintenance.*—An annuity given by a will is not a right to future maintenance within the meaning of s. 266 of the Civil Procedure Code, and can be attached in execution of a decree. GOPAL LAL SEAL *v.* MARSDEN (1906) . **10 C. W. N. 1102**

——— **s. 265**—*United Provinces Land Revenue Act (III of 1901), s. 107—Partition—Execution of Civil Court decree for partition of revenue-paying property.*—A decree of a Civil Court for partition is subject to the provisions of s 107 of the United Provinces Land Revenue Act and cannot be fully executed, until the decree-holder's name is recorded in the revenue papers. TULSI DAS *v.* SHEO NARAIN (1906) . . . **I. L. R. 28 All. 375**

——— **s. 266 (k)**—*Execution of decree—Attachment—Contingent right—Right of pre-emptor under a conditional decree for pre-emption.*—*Held*, that the interest in the pre-empted property of a successful pre-emptor, who has not yet paid the pre-emptive price fixed by his decree is an interest the attachment of which is prohibited by s. 266 (*k*) of the Code of Civil Procedure. GORAKH SINGH *v.* SIDH GOPAL (1906) . . . **I. L. R. 28 All. 383**

——— **s. 273**—*Execution of decree—Attachment—Decree for money—Decree for sale of mortgaged property.*—A decree for the sale of immoveable property under s. 88 of the Transfer of Property Act is not a decree for the payment of money or a decree for money, and is therefore liable to attachment and sale under the penultimate clause of s. 273 of the Code of Civil Procedure. *Takiya Begam* v. *Siraj-ud-daula, Weekly Notes, 1885, p. 123*, overruled. *Abdullah* v. *Doctor Oosman, I. L. R. 28 Mad. 244*, dissented from. *Sultan Kuar* v. *Gulzari Lal, I. L. R. 2 All. 290, Ram Charan Bhagat* v. *Sheobarat Rai, I. L. R. 16 All. 418, Barhma Din* v. *Baji Lal, I. L. R. 26 All. 91, Shiam Sundar* v. *Muhammad Ihtisham Ali, I. L. R. 27 All. 501, Jogul Kishore* v. *Cheda Lal, Weekly Notes, 1893, p. 184, Gopal Nana Shet* v. *Johari Mal Valad Jitaji, I. L. R. 16 Bom. 522, MacNaughten* v. *Surja Prasad Misra, 4 C. W. N. XXXV*, and *Baij Nath* v. *Binoyendro Nath, 6 C. W. N. 5*, referred to. DELHI AND LONDON BANK *v.* PARTAB SINGH (1906).

I. L. R. 28 All. 771

——— **ss. 276 and 305**—*Execution of decree—Attachment—Private sale pending attachment—Suit by vendee for recovery of possession.*—A judgment-debtor having executed a sale-deed of his house pending attachment in execution of a decree and the vendee having subsequently brought a suit to recover possession of the house, the lower Court dismissed the suit holding that s. 305 of the Civil

CIVIL PROCEDURE CODE (ACT XIV OF 1882) – *continued.*

Procedure Code (Act XIV of 1882) furnished an answer to the suit *Held*, reversing the decree, that the sale was a private alienation and it operated to convey to the plaintiff the interest of the vendor in the property the deed purported to pass. But to prevent frauds on decree-holders, it is provided by s. 276 of the Civil Procedure Code (Act XIV of 1882) that "when an attachment has been made by actual seizure or by written order duly intimated and made known in the manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise.....during the continuance of the attachment, shall be void as against all claims enforceable under the attachment." The sale, if made during the continuance of the attachment, would be void to the extent indicated in the section. S. 305 of the Civil Procedure Code (Act XIV of 1882) is an enabling section and qualifies the prohibition contained in s. 276; but on compliance with the conditions of that section a private alienation, notwithstanding s. 276, becomes absolute even against all claims enforceable under the attachment. If it did not become absolute under s. 305, then it would not be operative against claims enforceable under the attachment, but to that extent would be defeasible. SHIVLINGAPPA *v.* CHANBASAPPA (1905) . **I. L. R. 30 Bom. 337**

——— **s. 278.**

See LANDLORD AND TENANT.

——— **s. 278** – *Bengal Tenancy Act (VIII of 1885), ss. 65, 170—Plaintiff also a landlord at the date of the suit and decree for arrears of rent—Sale—Tenure—Claim.*—If at the time when a suit for arrears of rent is instituted and a decree made the plaintiff is still the landlord, the fact that he has subsequently sold his interest in the property does not prevent him from obtaining the benefit of s. 65 of the Bengal Tenancy Act and executing the decree against it. The suit having been instituted and the decree passed under this Act s. 170 of the Bengal Tenancy Act excludes the operation of s. 278 of the Civil Procedure Code. *Hem Chandra Bhunjo* v. *Mon Mohini Dassi, 3 C. W. N. 604*, overruled. KHETRA PAL SINGH *v.* KRITARTHMOYI DASSI (1906) . . . . **I. L. R. 33 Calc. 568**

——— **ss. 278 and 283**—*Execution of decree—Suit against successful claimant for declaration that certain property belongs to the judgment-debtor—Judgment-debtor not a necessary party.*—Where a decree-holder brings a suit against a successful claimant to establish that certain property belongs to his judgment-debtor and that he is entitled to bring it to sale in execution of his decree, the only person against whom he claims relief is the successful claimant. To such a suit the judgment-debtor is not a necessary party. GHASI RAM *v.* MANGAL CHAND (1905) . . . . **I. L. R. 28 All. 41**

——— **s. 280.**

See MITAKSHARA.

——— **s. 283**—*Suit brought under s. 283 not liable to dismissal because no further relief asked*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

—Specific Relief Act (I of 1877), s. 42.—The special right conferred by s. 283 of the Code of Civil Procedure on a claimant, whose claim is rejected, to sue for a declaration of his title in so far as it is affected by the order passed against him is not controlled by the proviso to s. 42 of the Specific Relief Act; and the plaintiff in such a suit is not bound to ask for any further relief to which he may be entitled. *Kunhiamma* v. *Kunhunni, I. L. R. 16 Mad. 140*, overruled. *Ambu* v. *Kettilamma, I. L. R. 14 Mad. 23*, followed. KRISTNAM SOORAYA *v.* PATHMA BEE (1905) . **I. L. R. 29 Mad. 151**

——— **s. 291**—*Transfer of Property Act (IV of 1882), s. 90—Execution of decree—Payment into Court of decretal money and costs—Stay of sale.*—Where the sale of mortgaged property has been directed by an order absolute under s. 89 of the Transfer of Property Act, 1882, it is open to the person holding the equity of redemption in such property to pay into Court at any time before the sale the amount of the decretal debt and costs, and thereupon the execution proceedings will cease. It is not necessary that the person holding the equity of redemption should wait, until the property is actually put up for sale. *Raja Ram Singhji* v. *Chunni Lal, I. L. R. 19 All. 205*, and *Harjas Rai* v. *Rameshar, I. L. R. 20 All. 354*, followed. *Bibijan Bibi* v. *Suchi Bewah, I. L. R. 31 Calc. 863*, referred to. MISRI LAL *v.* MITHU LAL (1905) . **I. L. R. 28 All. 28**

——— **s. 291**—*Sale in execution stayed—Omission to issue fresh proclamation—Sale after confirmation cannot be impeached by suit.*—Where a sale in execution of the appellant's property was stayed and a fresh proclamation was not issued as directed by s. 291 of the Civil Procedure Code, *Held*, that as the omission to issue it had involved no less to the appellants, and the sale had been in consequence confirmed, it was not competent for them under the clear provisions of the Civil Procedure Code to impeach the sale by regular suit. GAJRAJMATI TEORAIN *v.* AKBAR HUSAIN (1906). **L. R. 34 I. A. 37** s.c. **I. L. R. 29 All. 196**

——— **ss. 306 and 311**—*Execution of decree—Sale in execution—Non-payment of required portion of the purchase-money at date of sale—Irregularity.*—*Held*, that the fact that an auction purchaser at a sale held in execution of a decree did not pay the 25 per cent. of the purchase-money required by s. 306 of the Code of Civil Procedure at the time of the sale was a mere irregularity, which would not affect the validity of the sale, unless it could be shown that substantial injury was thereby caused to the judgment-debtor. *Intizam Ali Khan* v. *Narain Singh, I. L. R. 5 All. 316*, declared to be no longer law. AHMAD BAKHSH *v.* LALTA PRASAD (1905) . **I. L. R. 28 All. 238**

——— **s. 310A, Chap. XIX**—*Attachment—Private sale—Application to set aside sale—Sale under attachment.*—S. 310 A of the Civil Procedure Code (Act XIV of 1882) is applicable to a purchaser

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

subsequent to attachment and prior to sale under the attachment. Where there has been a subsequent sale following on the attachment, a person answering this description is one whose immoveable property has been sold under Chapter XIX of the Code. MULCHAND *v.* GOVIND (1906).

I. L. R. 30 Bom. 575

——— **ss. 310A and 622**—*Execution of decree—Application to set aside sale—Who have a right to apply—Revision.*—A mortgagee sued for sale on his mortgage impleading besides the mortgagee two persons, who claimed a title to the mortgaged property adverse to the mortgagee. In that suit it was decided that the property the subject of the mortgage in suit belonged to the mortgagor and not to the other defendants. The plaintiff mortgagee obtained a decree for sale and caused the mortgaged property to be sold by auction. The defendants, other than the mortgagor, applied to have this sale set aside under s. 310A of the Code of Civil Procedure, but their application was rejected and they then sought in revision to get this order reversed. *Held* by BANERJI, *J.*—That the defendants applicants were not entitled to make an application under s. 310A of the Code, they not being judgment-debtors, whose property had been sold. *Per* RICHARDS, *J.*—Whether or not applicants were entitled to make the application which they did make (and they possibly were so entitled) the Court below did not fail to exercise a jurisdiction vested in it by law nor did it act in the exercise of that jurisdiction illegally. Its order was, therefore, not open to revision. *Rajah Amir Hasan Khan* v. *Sheo Baksh Singh, L. R. 11 I. A. 237,* referred to. RAM SINGH *v.* SALIG RAM (1906).

I. L. R. 28 All. 84

——— **s. 315**—*Right of suit—Parties.*—S. 315 is only an enabling section and not prohibitive of an independent action in a Civil Court. A suit was brought by an auction-purchaser for the recovery of purchase-money from the decree-holder, who had received it, on the ground that the judgment-debtor had no title to the property sold: *Held,* that the suit was not barred by the provisions of s. 315 of the Civil Procedure Code. That the judgment-debtor was not a necessary party. SURENDRA NATH GHOSE *v.* BENI MADHAB MISRA (1906).

10 C. W. N. 274

——— **s. 320**—*Execution of decree—Property to be sold ancestral in part only—Transfer of decree to Collector—Notification (Local Government) No. 671, dated August 31st, 1880.—Held,* that where the Civil Court is satisfied that the land which is ordered to be sold or any portion of it is ancestral, it should transfer the decree for execution to the Collector so far as regards ancestral land only. AHMAD GHAUS KHAN *v.* LALTA PRASAD (1906).

I. L. R. 28 All. 631

——— **s. 331, Chap. XIX, prov. H**—*Decree for possession—Execution of decree—Obstruction—Application for removal of obstruction numbered and registered as suit—Adverse possession—Limitation.*—On the 1st June 1889 defendant's husband Vishnu sold certain land to Vithal and passed to him a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of that period, Vishnu, and after his death his widow, the defendant, continued in possession. Afterwards the plaintiffs, to whom the land had been sold, having obtained a decree for possession against the sons of Vishnu, Vishnu's widow, Kashibai, caused obstruction to delivery of possession in execution of the decree. The plaintiffs, thereupon, on the 22nd January 1902, applied for the removal of the obstruction and the Court, on the 26th July 1902, ordered that their application be numbered and registered as a suit between the decree-holders as plaintiffs and the claimant as defendant under s. 331 of the Civil Procedure Code (Act XIV of 1882), Chapter XIX, prov. H. *Held,* reversing the decree of the lower Appellate Court, that the suit was not time-barred. The claimant was not entitled as against the decree-holders to count the time up to the 26th of July 1902, when the application was numbered as a suit, as the period of his adverse possession; for it had ended prior to the 20th March 1890, by reason of the proceedings under prov. H. of Chapter XIX of the Code of Civil Procedure, initiated on the 22nd of January 1902. KRISHNAJI *v.* KASHIBAI (1906).

I. L. R. 30 Bom. 115

——— **s. 335**—*Execution—Possession by receipt of rent—Tenant—Sale—Decree—Objection to sale—Dispossession of third party in execution—Claimant to possession by receipt of rent from judgment-debtor—High Court.*—An application under s. 335 of the Civil Procedure Code, so far as it may purport to be made on behalf of the judgment-debtor, cannot be entertained. The term 'possession' in s. 335 of the Civil Procedure Code is not restricted merely to tangible or physical possession, but includes constructive possession or possession in law by receipt of rent or otherwise; a person alleging that he was in possession through his tenant, who had been ousted from the land by the delivery of possession to the purchaser, is entitled to make an application under that section. *Kisori Lal Gossami* v. *Lala Shib Lal, 1 C. W. N. 343,* and *Ibrahim Mullick* v. *Ramjadu Rakshit, I. L. R. 30 Calc. 710,* discussed. But a person alleging that he was in possession by receipt of rent from the judgment-debtor cannot get any relief under s. 335 of the Civil Procedure Code. When a Court, upon an erroneous view of the scope of a section of the Code, applies it to a case to which it has no application, it acts without jurisdiction. *Shivanathaji* v. *Joma Kashinath, I. L. R. 7 Bom. 341*; *Nusserwanji* v. *Meer Mynoodeen, 6 M. I. A. 134,* and *Jagodanund Singh* v. *Amrit Lal Sircar, I. L. R. 22 Calc. 767,* referred to. An order based upon and inseparably connected with another order, which is made without jurisdiction, and having the effect of making a section of the Code practically inoperative, is one made in the illegal exercise of jurisdiction *Mohunt Bhagwan Ramanuj Das* v. *Khettermoni*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

Dassi, 1 C. W. N. 647, referred to. BRAJABALA DEVI *v.* GURUDAS MUNDLE (1906).

I. L. R. 33 Calc. 487

——— **ss. 351 and 352**—*Rule of Damdupat, when applicable—Damdupat, if applicable, in insolvency proceedings—Practice.*—The rule of *damdupat* exists only so long as the contractual relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree. Proof of a claim in insolvency amounts to a decree and the rule of *Damdupat* would not apply to a claim so proved. Moreover, the uniform practice of this Court has been not to apply the rule of *damdupat* in insolvency proceedings. IN THE MATTER OF HARILALL MALLICK (1906).

10 C. W. N. 884
s.c. I. L. R. 33 Calc. 1269

——— **s. 367**—*Dispute as to who is the legal representative of a deceased plaintiff—Order admitting a person to be legal representative for the purpose of prosecuting the suit—Effect of such order.*—S. 367 of the Code of Civil Procedure empowers the Court in a case where a dispute arises as to who is the legal representative of a deceased plaintiff, to appoint a legal representative for the purpose of prosecuting the suit, but the appointment of such legal representative is not a determination of any issue, which is properly raised in the suit, and particularly (as, for example, in a suit for partition of family property) such a vital issue as whether the deceased plaintiff was joint with or separate from the rest of his family. PARSOTAM RAO *v.* JANKI BAI (1906) . **I. L. R. 28 All. 109**

——— **s. 373**—*Court has power to extend time for payment of costs.*—Where a party has been permitted to withdraw from a suit with liberty to bring a fresh suit, if he should pay costs within a named date under s. 373 of the Code of Civil Procedure, the Court has power to extend the time for payment, when it is absolutely impossible for the party to pay such costs on or before the day so fixed. PERIA MUTHIRIAN *v.* KARAPPANNA MUTHIRIAN (1906) . . **I. L. R. 29 Mad. 370**

——— **s. 396**—*Suit for partition of immoveable property—Commissioner appointed to make partition—Court not competent to modify Commissioner's report.*—Where in a suit for partition of immoveable property a Commissioner has been appointed under s. 396 of the Code of Civil Procedure to ascertain the shares of the parties, the Court, when passing its final decree, must either accept or reject the report of the Commissioner *in toto*, but is not competent to modify it. *Shah Muhammad Khan* v. *Hanwant Singh, Weekly Notes, 1898, p. 45.* JANKI PRASAD *v.* GAURI SHAHAI (1905).

I. L. R. 28 All. 75

——— **ss. 397, 649, Ch. XXV**—*Commission—Additional costs, order for, not entered in decree—If enforcible.*—When after the issue of a commission under Chapter XXV of the Civil Procedure Code, it is found that the work is in excess of the amount paid in for the costs of the commission, and that the party at whose instance the commission was issued is not willing to pay, the only way in which the additional costs can be realised is by making the amount costs of the suit and entering the same in the decree. An order for depositing additional costs, when not entered in the decree, cannot be enforced. TADHIN PROSHAD SINGH *v.* SARDAR COOMAR NARAYAN SINGH (1906).

10 C. W. N. 284

——— **s. 401**—*Application to file a suit in formâ pauperis—"Other than his necessary wearing apparel and the subject-matter of the suit"—Construction.*—The applicant applied for leave to file a suit *in formâ pauperis* alleging that after her husband's death, her husband's brother possessed himself of her property including the ornaments that she ordinarily was accustomed to wear. She sued to recover these ornaments. The Subordinate Judge rejected her application on the ground that she must have had these ornaments, which she had been accustomed to wear. *Held*, that the Subordinate Judge had failed to perceive that the point he had to consider was whether the applicant at the time at which the application was made, was possessed of sufficient means to enable her to pay the fees prescribed by law for the plaint. The words "other than his necessary wearing apparel and the subject-matter of the suit" in the explanation to s. 401 of the Civil Procedure Code, 1882, do not qualify that part of the explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rl00. KRISHNABAI *v.* MANOHAR (1906) . . **I. L. R. 30 Bom. 593**

——— **s. 411**—*Civil Procedure Code (Act VIII of 1859), s. 309—Suit in formâ pauperis—Successful petitioner—Charge of Government for Court-fees—Crown-debt, priority of.*—S. 411 of the Civil Procedure Code is an enabling section. Though it indicates the manner in which the Crown may proceed to realise Court-fees of a successful *pauper* plaintiff, which form a Crown-debt, it does not preclude the Crown or its representative from urging its prerogative and insisting on its right to precedence over all other creditors. A successful *pauper* plaintiff attached and sold for her costs certain property, other than the property in suit, belonging to the judgment-creditor. The sale-proceeds were paid into Court. The plaintiff's Solicitor applied to have his costs paid out of the sale-proceeds. The Government Solicitor also applied to have his certified Court-fees paid to him out of the fund in Court: *Held*, that the Government Solicitor was entitled to precedence and that it was not necessary for him to attach the fund before getting payment. *Secretary of State* v. *The Bombay Landing and Shipping Co., Ld., 5 Bom. H. C. 28 (O. C. J.); Gunput Putaya* v. *The Collector of Kanara, I. L. R. 1 Bom. 7; Gulzuri Lal* v. *Collector of Bareilly, I. L. R. 1 All. 596;*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

The Collector of Moradabad v. *Muhammad Daim, I. L. R. 2 All. 196*; *Ramdas* v. *The Secretary of State, I. L. R. 18 All. 419*; and *Bell* v. *The Municipal Commissioners, I. L. R. 25 Mad. 457*, referred to. GAYANODA BALA DASEE *v.* BUTTO KRISHNA DASS BAIRAGEE (1906).

10 C. W. N. 857
s.c. I. L. R. 33 Calc. 1040

——— **s. 443**—*Guardian ad litem—Procedure—Appointment of guardian ad litem invalid—Effect of invalidity on decree passed against minor defendant.*—The provisions of s. 443 of the Code of Civil Procedure as to the appointment of a guardian *ad litem* for a minor defendant are imperative, and where those provisions are not substantially complied with, the minor is not properly represented, and any decree which may be passed against him is a nullity. *Khirajmal* v. *Daim, L. R. 32 I. A. 23*, followed. *Walian* v. *Banke Behari Prasad Singh, I. L. R. 30 Calc. 1021*, distinguished. HANUMAN PRASAD *v.* MUHAMMAD ISHAQ (1906).

I. L. R. 28 All. 137

——— **s. 457**—*Guardian ad litem, appointment of married woman as—Compromise by guardian, validity of.*—The appointment of a married woman as guardian *ad litem* in a suit instituted against a minor is a mere irregularity and a compromise by such guardian under proper advice when sanctioned by the Court cannot be set aside on any ground which would be insufficient to set aside a compromise between persons *sui juris*. *Mussummat Bibi Walian* v. *Banke Behari Pershad Singh, L. R. 30 I. A. 182*, and *Brooke* v. *Lord Mostyn, 2 DeG. J. and S. 373 at p. 416*, referred to and followed. KACHAYI KUTTIALI HAJI *v.* UDUMPUMTHALA KUNHI PUTHA (1906).

I. L. R. 29 Mad. 58

——— **s. 462**—*Compromise of suit to which minor is a party defendant—Leave of Court to make compromise not obtained—Requisites for setting aside compromise so made—Form of decree setting it aside.*—In a suit to set aside a compromise of a suit on the ground that one of the defendants was a minor, and that the leave of the Court to enter into it had not been obtained under s. 462 of the Civil Procedure Code (Act XIV of 1882), in order to show that the exigencies of the provisions of the section had been complied with there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise; and it ought to be shown on petition, or in some way not open to doubt, that the leave of the Court was obtained. The fact that the minor was so described, and as appearing by a guardian, and that the compromise was before the Court, are not sufficient. Under the circumstances of the case the decree was limited to a declaration that the compromise and decree based on it were not binding on the minor, and that he was remitted to his original rights. MANOHAR LAL *v.* JADUNATH SINGH (1906) . . . **I. L. R. 28 All. 585**
s.c. L. R. 33 I. A. 128
s.c. 10 C. W. N. 898

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— **ss. 462 and 506** *et seq.*—*Guardian and minor—Arbitration—Authority of guardian to agree to a reference to arbitration on behalf of a minor.—Semble* that s. 462 of the Code of Civil Procedure does not apply to proceedings under Chapter XXXVII of the Code. A minor party therefore will be bound by the consent of his guardian to refer the matters in dispute to arbitration, if there is no fraud or gross negligence although the Court has not under the provisions of s. 462 sanctioned the agreement to refer. *Sheo Nath Saran* v. *Sukh Lal Singh, I. L. R. 27 Calc. 229*, and *Chengal Reddi* v. *Venkata Reddi, I. L. R. 12 Mad. 483*, followed. HARDEO SAHAI *v.* GAURI SHANKER (1905) . . **I. L. R. 28 All. 35**

——— **s. 463**—*Provisions of, not exhaustive—Lunatic not adjudged as such, suit by next friend of—Landlord and tenant—Non-transferable holding, usufructuary mortgage of—Ejectment—Transfer.*—The provisions of the Civil Procedure Code are not exhaustive. A lunatic may sue through his next friend even though not adjudged a lunatic under any law. *Jonnagadla* v. *Thatiparthi, I. L. R. 6 Mad. 380*, dissented from. RASIK LAL DUTT *v.* BIDHU MUKHI DASI (1906) **10 C. W. N. 719**
s.c. I. L. R. 33 Calc. 1094

——— **ss. 491 and 588**—*Attachment before judgment—Compensation for unnecessary attachment—Appeal.—Held*, that no appeal will lie from an order under s. 491 of the Code of Civil Procedure granting compensation to a person against whom an attachment has been obtained upon insufficient grounds. *Narasinga Bhakshi* v. *Govinda Bhakshi, I. L. R. 24 Mad. 62*, followed. LOK NATH *v.* AMIR SINGH (1905).

I. L. R. 28 All. 81

——— **ss. 520, 525, 526**—*Order to file or refusing an application to file an award appealable—Award determining matters not referred cannot be filed.*—An order made on an application under s. 525 of the Code of Civil Procedure to file an award, whether such prayer is granted or refused is a decree and appealable as such. *Ponnusami Mudali* v. *Mandisundara Mudali, I. L. R. 27 Mad. 255*, followed. Where an award determines matters not referred to arbitration, the Court, under ss. 520 and 526 of the Code of Civil Procedure, is bound to refuse to file the award. THIRUVENGADATHIENGAR *v.* VAIDINATHA AYYAR (1905).

I. L. R. 29 Mad. 303

——— **ss. 521, 588**—*Award—Objections to award—Award set aside—Appeal.—Held*, that no appeal lies from an order under s. 521 of the Code of Civil Procedure setting aside an award. *Shyama Charan Pramanik* v. *Prolhad Durwan, 8 C. W. N. 390*, followed. *Naurang Singh* v. *Sadapal Singh, I. L. R. 10 All. 8*, overruled. *Pureshnath Dey* v. *Nabin Chunder Dutt, 12 W. R. 93*, and *Rughoobur Dyal* v. *Maina Koer, 12 C. L. R. 564*, referred to. GANGA PARSHAD *v.* KURA (1906) . . . . **I. L. R. 28 All. 408**

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

——— s. 525—*Award—Order rejecting application to file award made out of Court—Appeal.—Held,* that no appeal will lie from an order refusing to file an award made between the parties without the intervention of a Court. *Bhola* v. *Gabind Dayal, I. L. R. 6 All. 186,* and *Katik Ram* v. *Babu Lal, Weekly Notes, 1903, p. 234,* followed. *Ghulam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167,* distinguished. *Muhammad Newaz Khan* v. *Alam Khan, I. L. R. 18 Calc. 414,* referred to. BASANT LAL v. KUNJI LAL (1905).

I. L. R. 28 All. 21

——— s. 525—*Arbitration—Validity of reference disputed—Jurisdiction of Court to decide as to validity of reference—Civil Procedure Code, s. 622.—Held,* that upon an application made to it under s. 525 of the Code of Civil Procedure, the Court has jurisdiction to and is bound to enquire into the question whether the parties had or had not referred the matter in question to arbitration. *Amrit Ram* v. *Dasrat Ram, I. L. R. 17 All. 21, Mahomed Wahid-ud-din* v. *Hakiman. I. L. R. 25 Calc. 757,* and *Manilal Hargovandas* v. *Vanmalidas Amratlal, I. L. R. 29 Bom. 621,* referred to. GANESH SINGH v. KASHI SINGH (1906).

I. L. R. 28 All. 621

——— ss. 525, 526.—*Arbitration, private—Award—Decree—Legality of award—Appeal—S. 522, if applies.*—When an application under s. 525 of the Civil Procedure Code, to file a private award is allowed and a decree drawn up in accordance therewith, no appeal lies from such a decree, though an appeal would lie from an order refusing to file the award. *Ghulam Gilani* v. *Muhammad Ahmed, 6 C. W. N. 226 : s.c. I. L. R. 29 Calc. 167: L. R. 29 I. A. 51,* referred to. *Kali Prosanna Ghose* v. *Rajani Kanta, I. L. R. 25 Calc. 141,* and *Mahomed Wahiuddin* v. *Hakiman, I. L. R. 25 Calc. 757,* in so far as they decided that a decree made in accordance with an award is appealable on the ground that there is no valid and legal award have been overruled by the Privy Council in *Ghulam Jilani* v. *Muhammad Ahmed, 6 C. W. N. 226 : s.c. I. L. R. 29 Calc. 167 : L. R. 29 I. A. 51. Per* MOOKERJEE, *J., Quære*—Whether an appeal against a decree made in accordance with an award under s. 526 of the Civil Procedure Code, is barred even in cases where the cause shown against the award has denied the submission to arbitration or the genuineness of the award. *Husananna* v. *Linganna, I. L. R. 18 Mad. 423,* referred to. CHINTAMONEY ADITYA v. HALADHUR MAITI (1906) . . **10 C. W. N. 601**

——— s. 526—*Private award—Application to file—Objection under s. 520—Matters left undetermined—Disallowance of objection—Decree directing award to be filed—Appeal—S. 522, when applies—Practice—Mofussil Courts—Original Side—Revision, power of, of High Court—Exercise suo motu.—Per* CURIAM (RAMPINI and PRATT, *JJ.*, contra)—An appeal lies from an order passed under s. 526 of the Civil Procedure Code merely directing the filing of an award made on a submission to arbitration without the intervention of a Court of Justice. Upon an application under s. 525, to have a private award filed, the opposite party objected that the arbitrator had left undetermined certain matters referred to him for decision. The objection was overruled and the award was ordered to be filed and a formal decree was drawn up containing the following direction : "It is ordered that the arbitration award in this case be filed in Court." This decree was set aside on appeal, the lower Appellate Court holding the objection to be a valid one. *Held* (*per* CURIAM, MACLEAN, *C. J.*, and SALE, *J.*, contra)—That no appeal lay from the decree of the first Court and the lower Appellate Court had no authority to interfere with it. *Per* MACLEAN, *C.J.*, and GHOSE, *J.*—When an award has been ordered to be filed under s. 526, the party in whose favour it is, must proceed to obtain a judgment and consequent decree under s. 522, and if that decree is according to the award, then there is no appeal from it. *Per* GHOSE, RAMPINI and PRATT, *JJ.*—The decree in this case was substantially a decree in accordance with an award as contemplated by s. 526 read with s. 522. *Per* SALE, *J.*—No decree expressly incorporating the terms of the award is required to be drawn up in pursuance of the order to file the award made under s. 526, nor is the clause restricting the right of appeal in the case of a decree made under s. 522, applicable to an order to file an award made under s. 526. *Per* RAMPINI and PRATT, *JJ.*—No appeal lies from an order directing an award to be filed under s. 526, except when the decree is in excess of, or not in accordance with, the award, although an order refusing to file the award is appealable. *Per* MACLEAN, *C. J.*—An order directing as well as one refusing the filing of an award stand on the same footing as regards appealability. *Ghulam Jilani* v. *Muhammad Ahmed, 6 C. W. N. 226 : s.c. I. L. R. 29 Calc. 167 : L. R. 29 I. A. 51,* considered. PER CURIAM—The High Court can interfere under s. 622, of its own motion and in the absence of an application under that section. JANOKEY NATH GUHA ROY v. BROJO LAL GUHA R (1906).

10 C. W. N. 609
s.c. I. L. R. 33 Calc. 757

——— s. 539—*Public trusts—Sanction of the Advocate-General—S. 539 of the Civil Procedure Code, if mandatory or permissive—Its scope—Religious Endowments Act (XX of 1863), s. 14—Demurrer.*—To bring a case within the purview of s. 539 of the Civil Procedure Code the suit must be a representative one brought for the benefit of the public and to enforce a public right in respect of an express or constructive public trust upon a cause of action alleging a breach of such trust or necessity for directions as to its administration against a trustee of such express or constructive trust and whether such trustee be so *de jure* or *de son tort* and for the particular relief mentioned. Suits brought not to establish a public right, but to remedy a particular infringement of an individual right are not within the section. As against strangers, such as alienees from the trustee and mere

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

trespassers holding adversely to the trust, the section does not apply. Meaning of the phrases "direction of the Court is necessary for the administration" and "such further or other relief" in s. 539 explained. S. 539 is not mandatory but enabling and permissive; cumulative and not restrictive in its effect and does not affect any right of suit which may exist independently of it. If therefore a suit is one which would have been maintainable prior to the enactment of the corresponding section in the Code of 1877 it may now be instituted independently of the provisions of s. 539, even though it be upon such a cause of action and for such relief as is mentioned in it. Scope and history of the section discussed and explained. BUDREEDAS MUKIM BAHADUR v. CHUNI LAL JOHURRY (1906) . . 10 C. W. N. 581 s.c. I. L. R. 33 Calc. 789

——— s. 539—*Public charitable or religious trust—Suit for administration of trust—Nature of decree which may be passed in such suit.—Per* STANLEY, *C.J.*—In a suit under s. 539 of the Code of Civil Procedure it is competent to the Court to determine of what the trust properties consist or find that particular alienations thereof cannot be maintained, provided all proper parties are represented before it. If transferees or mortgagees, who have been impleaded in a suit instituted under s. 539, do not accept the findings of the Court in that suit, it may be necessary for the trustee appointed by the Court to institute a suit for recovery of possession. And *semble* that in such a suit it is competent also to the Court to direct a trustee, who is being removed from the trusteeship, to make over the trust property to the new trustee or trustees. *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav, I. L. R. 24 Calc. 418,* followed. *Per* BURKITT, *J.*—In a suit under s. 539 of the Code of Civil Procedure it is not competent to the Court to pass a decree for recovery of possession of the trust property from alienees. All the plaintiffs in such a suit can obtain is a decree appointing a trustee or trustees, declaring what properties are affected by the trust and directing the trustee to bring those properties into possession. If the trustee appointed by the Court is resisted in his attempts to get possession of the trust property, he must then bring a suit for possession in the proper Court on payment of the full Court-fee for such a suit. GHAZAFFAR HUSAIN KHAN v. YAWAR HUSAIN (1905) . . . . I. L. R. 28 All. 112

——— s. 539—*Suit relating to public charity—Suit filed by only one plaintiff with the consent of the Advocate General—Amendment of plaint by subsequent addition of second plaintiff—Consent of the Advocate General to the amendment—Suit defective in a material particular.*—A suit relating to a public charity was instituted by one plaintiff only with the consent of the Advocate General under s. 539 of the Civil Procedure Code (Act XIV of 1882). The defendant having objected to the institution of the suit by one plaintiff, the plaint was amended by the addition of the second plaintiff and the Advocate General consented to the amendment.

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

Held, dismissing the suit in appeal, that the suit was defective in a material particular. The suit was bad at its institution and its amendment by adding a second plaintiff did not better it. DARVES HAJI MAHAMAD v. JAINUDIN (1906). I. L. R. 30 Bom. 603

——— ss. 544 and 561—*Appeal—Practice—Appeal by defendant against plaintiff and other defendants—Objection by plaintiff respondent when entertainable as against co-respondents.*—Where it is necessary for the proper decision of an appeal before it, it is competent to an appellate Court to take into consideration objections filed under s. 561 of the Code of Civil Procedure by one of the respondents, not only as against the appellant, but, it may be, as against the co-respondents with the objector also, and to modify the decree as against them accordingly. *Bishun Churn Roy Chowdhry* v. *Jogendro Nath Roy, I. L. R. 26 Calc. 114,* followed. *Mahomed Ameer* v. *Prankishore Deb, 21 W. R. 338,* referred to. *Kalu* v. *Manni, I. L. R. 23 All. 93,* distinguished. ABDUL GHANI v. MUHAMMAD FASIH (1906) . I. L. R. 28 All. 95

——— ss. 546, 583—*Appellate Court—Power of Appellate Court to take security from respondent, who has executed decree—Power to grant restitution of rights—Execution of decree—Stay of execution—Order of Appellate Court staying execution—Effect of uncommunicated order on subsequent proceedings—Civil Procedure Code (Act XIV of 1882) not exhaustive.*—Under the principle indicated by s. 583 of the Code of Civil Procedure a decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree, and the Appellate Court, having *seizin* of the appeal, has, as ancillary to its duty to grant restitution, an inherent power in the exercise of which it can, notwithstanding that the decree appealed against has been executed, call upon the respondent to furnish security for the due performance of any decree, which may be made on the appeal. When the Appellate Court has made an unconditional order for stay of execution the operation of the order is not postponed, until it has been communicated to the Subordinate Court or the party intended to be affected by it. The order becomes operative the moment it is made, and suspends the power of the Subordinate Court to carry on further the execution proceedings. Delivery of possession to the decree-holder made by a Subordinate Court after an unconditional order by the Appellate Court for stay of execution, but before such order could be communicated to it, is invalid and cannot stand. *Bessesswari Chowdhurany* v. *Hurro Sundar Mazumdar, 1 C. W. N. 226,* dissented from. The Code of Civil Procedure binds all Courts so far as it goes. It is not, however, exhaustive and does not affect previously existing powers, unless it takes them away. In matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties, which is warranted under the circumstances and

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

which the necessities of the case require. *Held* (by WOODROFFE, *J.*, MOOKERJEE, *J.*, dissenting) that s. 546 of the Civil Procedure Code does not apply where the order for execution has been actually carried out. HUKUM CHAND BOID *v.* KAMALANAND SINGH (1905). **I. L. R. 33 Calc. 927**

——— **ss. 551, 623**—*Decree passed by first Court allowing plaintiff's claim—Appeal by defendant—Summary dismissal of appeal—Application by defendant to the first Court for review—Jurisdiction.*—Plaintiff having obtained a decree in the first Court, the defendant appealed, but his appeal was summarily dismissed under s. 551 of the Civil Procedure Code (Act XIV of 1882). Subsequently the defendant applied to the first Court for review of judgment under s. 623 of the Code on the ground of discovery of new and important evidence. *Held*, that as the defendant had preferred an appeal and it was dismissed under s. 551 of the Code, his application to the first Court for review of judgment could not be entertained. It is open to the person aggrieved, after an appeal has been preferred, to apply for a review, provided his appeal is withdrawn. As by the cancellation of the order for admission of an appeal it is to be taken that no appeal was admitted, so by withdrawal of the appeal it must be treated as though no appeal was preferred. But when an appeal is actually dismissed, it was in fact preferred and cannot be regarded as not having been preferred. RAMAPPA *v.* BHARMA (1906). **I. L. R. 30 Bom. 625**

——— **s. 566**—*Remand—Preliminary point.*—When a Court of first instance does not decide a case on a preliminary point, but raises all the issues and goes fully into the matters in issue, it is not open to the Appellate Court to remand the case under s. 562 of the Civil Procedure Code, but if it thinks that the determination of any particular question is necessary, it may make an order under s. 566 of the Civil Procedure Code. AMBICA CHURN DAS *v.* KALA CHANDRA DAS (1906). **10 C. W. N. 422**

——— **s. 578**—*Plaint verification.*—Where a plaint on behalf of Government was signed by the Collector and by a pleader, who was not the Government pleader, but who generally acted for Government, and the verification was signed by the Collector and the Government pleader. *Held per* RAMPINI, *J.*—That the plaint was properly presented. PER CURIAM—That the defects, if any, in the signing and verification of the plaint, were cured by s. 578. RAKHAL CHANDRA TEWARY *v.* SECRETARY OF STATE FOR INDIA (1906). **10 C. W. N. 841**

——— **s. 584**—*Power of Court on second appeal to examine evidence of usage—Custom—Ryot, right of, to trees.*—A ryot holding lands in a zamindari on a permanent tenure would, as regards land on which a money assessment is paid, be *primâ facie* entitled exclusively to the trees thereon.

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

Where the crops are shared between the ryot and zamindar, they will be jointly interested in such trees, but such presumptions may be rebutted by proof of usage or contract to the contrary. *Narayana Ayyangar* v. *Orr, I. L. R. 26 Mad. 252*, followed. Although the provisions of s. 584 of the Code of Civil Procedure disallow a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of the Court, when it has to pronounce an opinion upon such question to examine the evidence bearing on it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it. Custom in India is transcendent law. A custom cannot be established by a few instances or by instances of recent date. Observations on the nature of evidence necessary to support custom. *Eranjoli Vishnu Nambudri* v. *Eranjoli Krishnan Nambudri, I. L. R. 7 Mad. 3*, followed. *Hurry Churn Das* v. *Nimai Chand Keyal, I. L. R. 10 Calc. 138*, not followed. *Bai Shrinbai* v. *Kharshedji, I. L. R. 22 Bom. 430*, not followed. KAKARLA ABBAYYA *v.* VENKATA PAPAYYA RAO (1906) . . . **I. L. R. 29 Mad. 24**

——— **s. 596**—*Appeal to Privy Council—Valuation for purposes of appeal—Suit for partition.*—For the purposes of valuation within s. 596 of the Code of Civil Procedure, the value of the subject-matter of the suit, in a suit for partition, is the value of the whole estate, which it is sought to partition and not merely of the particular share, which one of the parties may claim. When the value of the whole estate is over ₹10,000, appeal would lie to His Majesty in Council, because the decree appealed from would "involve directly or indirectly some claim or question to or respecting property" of that value, within the meaning of the section. *Semble*—The "value of the matter in dispute in appeal" in such a case is the value of the whole estate and not merely the share claimed by the plaintiff. LALA BHUGWAT SAHAY *v.* RAI PASHUPATI NATH BOSE (1906) . **10 C. W. N. 564**

——— **s. 596**—*Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 21—Suit for partition—Valuation—Appeal.*—In a suit for partition, the value of the entire estate, and not the value of the plaintiff's share in it, is the value of the original suit within the meaning of s. 21 of Act XII of 1887. BIRAJ MOHINI DASI *v.* CHINTAMONI DASI. Footnote to (1906). . **10 C. W. N. 565**

——— **s. 596**—*Application for leave to appeal to His Majesty in Council—Limitation Act (XV of 1877), ss. 5 and 12.*—*Held*, that neither s. 5 nor s. 12 of the Limitation Act, 1877, applies to applications under s. 596 of the Code of Civil Procedure for leave to appeal to His Majesty in Council. *Jawahir Lal* v. *Narain Das, I. L. R. 1 All. 644.*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*continued.*

In the matter of the petition of Sita Ram Kesho, I. L. R. 15 All. 14; Moraba Ram Chandra v. *Ghanasham Nilkant Nadkarni, I. L. R. 19 Bom. 301,* and *Anderson* v. *Periasami, I. L. R. 15 Mad. 195,* followed. SHIB SING v. GANDHARP SINGH (1906) . . . . **I. L. R. 28 All. 391**

——— **s. 601**—*Privy Council, appeal to—Leave to appeal, application for—Certificate, refusal of—Grounds to be stated.*—The High Court in refusing a certificate for leave to appeal to His Majesty in Council should state the grounds for refusing it. VENGANATH SWAROOPATHIL VALIA NAMBIDI v. CHERAKUNNATH NAMBIYATHAN NAMBUDRIS (1906) . . **10 C. W. N. 545**
s.c. **I. L. R. 29 Mad. 194**
L. R. 33 I. A. 67

——— **s. 610**—*Execution of decree—Privy Council—Restoration of property alienated pending appeal to the Privy Council—Procedure.*—Pending an appeal to His Majesty in Council, certain property forming part of the subject-matter of the suit, in which such appeal had been preferred, was sold by auction in execution of a money decree against the plaintiff, who held the decree of the High Court under appeal. The defendant's appeal to the Privy Council was decreed. *Held,* that the successful appellant was entitled to recover the property sold as above mentioned by means of an application under s. 244 read with s. 610 of the Code of Civil Procedure, and this right was not affected by the fact that the auction purchasers were not parties to the decree of the Privy Council. *Gulzari Lal* v. *Madho Ram, I. L. R. 26 All. 447,* followed. *Bhagwati Prasad* v. *Jamna Prasad, I. L. R. 19 All. 136,* and *Sadiq Husain* v. *Lalta Prasad, I. L. R. 20 All. 139,* distinguished. GARUEDHUJ PRASAD SINGH v. BAIJU MAL (1906).
I. L. R. 28 All. 337

——— **s. 617**—*Reference—Reasonable doubt—Point clearly decided by the rulings of the High Court of Presidency.*—A reference under s. 617 of the Civil Procedure Code can only be made when the Judge of the Court entertains a reasonable doubt. A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presidency, unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council. BHANAJI v. DE BRITO (1905).
I. L. R. 30 Bom. 226

——— **s. 622**—*Liability of broker—Burden of proof—Decree unsupported by any evidence—Jurisdiction.*—A decree, which is unsupported by any evidence, is made without jurisdiction and is liable to be set aside under s. 622 of the Civil Procedure Code. *Downman* v. *Williams, 7 Ad. and E. (N. S.) 103, 111,* and *Shields* v. *Wilkinson, I. L. R. 9 All. 398,* followed. BISSESSUR DASS v. JOHANN SMIDT (1906).
10 C. W. N. 14

——— **s. 623**—*Ground of review—Fraud—Mistake.*—The ground that fraud was practised upon a party in connection with a petition of compromise upon which a decree was made is a good ground of review under s. 623. A mistake in the matter of copying out the petition of compromise may not by itself fall within the scope of s. 623, but taking it with the other ground stated above it might be a good ground of review. RASIK CHANDRA CHOWDHURY v. RAJANI RANJAN CHOWDHURY (1906) . . . . **10 C. W. N. 286**

——— **s. 623**—*Review of judgment—Effect of order on review—Appeal from original decree.*—Where an application for review of judgment is granted, the result is a new decree superseding the original decree, and not merely some amendment thereof. An appeal was filed pending an application for review of judgment in the Court below; the review was granted, and an order passed which purported merely to amend the decree then under appeal. *Held,* that the order for review superseded the original decree; the decree under appeal had ceased to exist and the appeal could not be heard. *Kuar Sen* v. *Ganga Ram, Weekly Notes, 1890, p. 144,* followed. KANHAIYA LAL v. BALDEO PRASAD (1906) . . . **I. L. R. 28 All. 240**

——— **ss. 623, 626**—*Order in execution—Decree—Review—Order rejecting application for review—Appeal.*—An order in execution, being a decree under the Civil Procedure Code, was passed on the 20th November 1902 and a supplementary order as to costs was made on the 20th December following. On the 3rd August 1903 the party aggrieved by the latter order applied under s. 623 of the Civil Procedure Code for a review of judgment. Notice was issued to the opposite party and the application for review was heard with the result that the Judge after disposing of certain technical objections proceeded to deal with the case on the merits, and having done so, he rejected the application for review with costs on the 14th September 1903. Against the said order the applicant having appealed, *Held* that the order rejecting the application for review was not appealable. The proper procedure would be to appeal from the order of the 20th December 1902 relating to costs. A petition of review involves three stages of procedure. The first stage commences ordinarily with an *ex parte* application under s. 623 of the Civil Procedure Code. The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause, why the review should not be granted. In the second stage the rule may either be admitted or rejected and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached. The case is re-heard on the merits and may result in a repetition of the former decree or some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for in the

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*concluded.*

latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to and still rest, on the old decree. VADILAL v. FULCHAND (1905).

I. L. R. 30 Bom. 56

CLAIM.

See HINDU LAW . **10 C. W. N. 978**

See LANDLORD AND TENANT.

I. L. R. 33 Calc. 566

COAL.

See LEASE . **I. L. R. 33 Calc. 203**

COLLECTOR.

See LAND ACQUISITION ACT (I OF 1894), S. 3, CL. (*c*) . **I. L. R. 33 Calc. 396**

COMMISSION.

See CIVIL PROCEDURE CODE.

COMMITMENT.

See CRIMINAL PROCEDURE CODE.

COMMON MANAGER.

See BENGAL TENANCY ACT.

10 C. W. N. 437

COMPANIES ACT (VI OF 1882).

See CIVIL PROCEDURE CODE.

——— s. 4—*What is 'association' within the meaning of—Legal relation creating joint or mutual rights necessary—Chitfund.*—"To constitute an 'association' within the meaning of s. 4 of the Indian Companies Act, the existence of a legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary." *Panchena Manchu Nayar* v. *Gadinhare Kumaranchath Padmanabhan Nayar, I. L. R. 20 Mad. 68 at p. 73,* referred to and approved. Where more than twenty persons enter into an agreement by which a chitfund is created and it is clear from the agreement that the only proprietors of the fund are the two organisers and the other persons have entered into no contract with each other, the parties to such agreement do not form an association of which registration is necessary under s. 4 of the Indian Companies Act. NEELAMEGA SASTRI v. APPIAH SASTRI (1906).

I. L. R. 29 Mad. 477

——— s. 58—*Suit by a share-holder—Jurisdiction—Right to vote at meetings of share-holders—Cause of action, when not allowed to vote.*—At a meeting of the share-holders of a Company, certain of the share-holders were, according to the decision of the majority of those present, not allowed to vote: these share-holders instituted a suit for a declaration that they were entitled to vote at the meetings of the Company. *Held,* that the plaintiffs had a cause of action although their names might not have been struck off from the list of share-holders and that there was nothing in the Companies' Act to exclude the jurisdiction of ordinary Civil Courts in such a suit. *Penders* v. *Lushington, 6 Ch. Div. 70,* referred to. GOBINDA PROSAD DASS v. AKHOY KUMAR DEY (1906).

10 C. W. N. 906

——— ss. 149, 214.

See PRACTICE . **I. L. R. 30 Bom. 173**

COMPANY.

See COMPANIES ACT.

See PRACTICE.

COMPLAINT.

See CRIMINAL PROCEDURE CODE.

——— *Petition—False charge—Police—Magistrate—Order to show cause without examination of complainant and disposal of complaint—Reference—Inquiry—Criminal Procedure Code (Act V of 1898), ss. 4 (h), 200 to 203—Penal Code (Act XLV of 1860), s. 211.*—J laid a charge at the thana against two persons, under s. 436 of the Penal Code, which the police after investigation reported as false. He thereupon filed a petition before the Subdivisional Magistrate impugning the correctness of the police report, and praying that the persons accused by him might be brought to trial. The Magistrate did not examine the complainant, but ordered the petition to be "put up with the police report," and on the next day required him to show cause why he should not be prosecuted under s. 211 of the Penal Code. He afterwards referred the case for inquiry and report to a Sub-Deputy Magistrate with second class powers, who after examining the complainant and his witness, reported the charge to be maliciously false. The Subdivisional Magistrate then heard J's pleaders, and agreeing with the report passed an order directing his prosecution. *Held,* that the petition to the Subdivisional Magistrate was a "complaint" within s. 4 (*h*) of the Criminal Procedure Code. *Held,* further, that according to the current of decisions of the Court, when a person institutes before the police criminal proceedings found on enquiry to be false, before he can be prosecuted under s. 211 of the Penal Code, he must first have an opportunity of proving his case, that if he impugns the correctness of the police inquiry by a petition, he is entitled to have the persons complained against tried on the charge, or else his statement must be recorded on oath and his complaint dismissed under s. 203 of the Criminal Procedure Code; and that the order of the Magistrate in the case was therefore bad. *In the matter of Chukradhar Potti, 8 C. L. R. 289, Queen-Empress* v. *Sham Lall, I. L. R. 14 Calc. 707, Mahadeo Singh* v. *Queen-Empress, I. L. R. 27 Calc. 921, Gunamony Sapui* v. *Queen-Empress, 3 C. W. N. 758, Budh Nath Mahat*

COMPLAINT—*concluded.*

Empress, C. W. N. 905, In re Sahiram Agarwalla, 5 C. W. N. 254, Dusarath Singh v. *Emperor*, unreported. Cr. Rev. No. 2773, dated 14th August 1903, followed, but the propriety of the procedure laid down in these cases discussed. *Ramasami* v. *Queen-Empress, I. L. R. 7 Mad. 292, Imperatrix* v. *Jijibhoi Gobind, I. L. R. 22 Bom. 596, Queen-Empress* v. *Roghu Tewari, I. L. R. 15 All. 336*, referred to. JOGENDRA NATH MOOKERJEE *v.* EMPEROR (1906) . . **I. L. R. 33 Calc. 1**

COMPROMISE.

See ADVOCATE.

See COSTS . **I. L. R. 30 Bom. 27**

See DEPOSIT . . **10 C. W. N. 535**

See LEGAL PRACTITIONERS ACT. **10 C. W. N. 57**

See SUIT . . **10 C. W. N. 529**

See WAKFNAMA . **10 C. W. N. 560**

——— *Compromise presented, but not decreed —Order to proceed with suit puts an end to such compromise—Procedure in sanctioning compromise on behalf of minors.*—Where a compromise had been presented, but no decree had been passed in accordance with its terms, and the Court subsequently at the instance of one of the parties, ordered the suit to be proceeded with on the issues framed before the compromise and on other issues, the compromise must be deemed to have been put an end to and the Court cannot, at a subsequent stage, treat the compromise as subsisting and proceed to pass a decree upon it. In sanctioning compromises on behalf of minors, the order should state in terms that the question whether the compromise was for the benefit of the minors was considered. GOVINDASAMI NAIDU *v.* ALAGIRISAMI NAIDU (1906) . . **I. L. R. 29 Mad. 104**

CONFIDENTIAL RELATION.

See TRUSTEE.

CONSIDERATION.

See BENAMI TRANSACTION. **10 C. W. N. 570**

See BOND . . **10 C. W. N. 788**

CONSTRUCTION OF DOCUMENT.

See ACT IV OF 1882, SS. 10, 86, 88 AND 110 (*g*) **223, 400**

See ACT II OF 1899, SCH. I, ART. 1. **I. L. R. 28 All. 436**

See ACT (LOCAL) II OF 1901, SS. 56, 57 (*a*) AND (*c*), AND 80 **I. L. R. 28 All. 610**

See DOCUMENT.

See MORTGAGE . **I. L. R. 28 All. 157, 225, 622, 724**

See MUHAMMADAN LAW. **I. L. R. 28 All. 342**

CONSTRUCTION OF DOCUMENT—*concluded.*

See PRE-EMPTION . **I. L. R. 28 All. 60, 168, 454, 456, 618**

See WAJIB-UL-ARZ **I. L. R. 28 All. 488**

CONSTRUCTION OF STATUTE.

See LAND ACQUISITION ACT. **I. L. R. 30 Bom. 275**

CONSTRUCTION OF WILL.

See WILL. **I. L. R. 30 Bom. 477, 493**

CONSTRUCTIVE TRUST.

See ESTOPPEL . . **10 C. W. N. 747**

CONTINUOUS USER.

See GRANT . **I. L. R. 33 Calc. 1290**

CONTRACT.

See GUARDIAN . **10 C. W. N. 763**

See JURISDICTION. **I. L. R. 33 Calc. 1065**

——— **by bought and sold notes.**

See ARBITRATION ACT (IX OF 1899), SS. 4, 5 . . **I. L. R. 33 Calc. 1237**

See LANDLORD AND TENANT. **10 C. W. N. 533**

See PARTNERSHIP . **10 C. W. N. 313**

——— *Assignability—Transfer of Property Act (IV of 1892), s. 3—"Actionable claim"—Beneficial interest in moveable property—Transfer of Property Act (IV of 1882), s. (h)—Contract Act (IX of 1872), s. 23—"Object or consideration."*—The right to claim the benefit of a contract for the purchase of goods is a "beneficial interest in moveable property" within the definition of "actionable claim" in s. 3 of the Transfer of Property Act (IV of 1882), and, as such, assignable. In s. 6 (*h*) of the Transfer of Property Act (IV of 1882) and s. 23 of the Contract Act (IX of 1872), the words "object" and "consideration" are not synonymous, but distinct in meaning, the word "object" meaning "purpose." *Semble*, the benefit of a contract, that is the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby, are assignable, provided that (*a*) the benefit is not coupled with any liability or obligation that the assignor is bound to discharge, and (*b*) the contract has not been induced by personal qualifications or considerations as regards the parties to it. JAFFER MEHER ALI *v.* BUDGE BUDGE JUTE MILLS COMPANY (1906) . . **I. L. R. 33 Calc. 702** s. c. **10 C. W. N. 755**

——— *Goods—Mate's receipt—Fraud—Bills of lading—Goods purchased for shipment abroad —Unascertained goods—Appropriation of goods*

CONTRACT—*continued.*

by seller to the contract—Conditional appropriation—Conversion of Mate's receipts into bills of lading before payment—Pledge of bills of lading to a third party without notice of seller's claim for the price of goods—Contract Act (IX of 1872), ss. 77, 78, 82, 83, 88, 178.—*A* purchased certain goods from *B* for shipment abroad delivery to be made at a later date. Cl. 13 of the contract provided as follows:—"Terms of payment cash on delivery of mate's receipts, dock receipts, or as provided in cls. 8, 9, and 11. Should the said receipts or warrants be retained by the buyer for examination, they shall remain the property of the sellers and be held by the buyers in trust for and at the absolute disposal of the sellers, until payment has been made in cash in terms of this contract, and if payment be made by cheque, until such cheque has been cashed." Under *A*'s instructions the goods were placed alongside the vessel by the seller and subsequently shipped. Mate's receipts were made over to *A* for examination together with *B*'s bill for payment. *A* subsequently without paying for the goods obtained bills of lading in exchange for mate's receipts, and thereafter pledged them with *C* without notice of *B*'s claim, and *C* thereupon gave credit to *A* for the full amount of the bills of exchange drawn against the goods represented by the bill of lading. *Held*, that the goods under the contract were unascertained at the date of contract, and therefore the sale was not complete, unless there was an appropriation by *B* as seller of the goods for the purpose of the contract, and that appropriation was found to be assented to by *A*. *Held also* that under cl. 13 of the contract the seller *B* obtained a special property in the mate's receipts even though standing in the name of the buyer *A*, which would enable *B* to hold the documents as security for payment as against the real owner of the goods, and that there was nothing in the contract to show that the appropriation of the goods to the contract was intended by *B* to be other than final and absolute, that the sale and transfer to *A* was complete, and *A* had a right to dispose of the goods as owner, and in obtaining possession of the mate's receipts gained the means of exercising that right. So when *A* obtained bills of lading in exchange for mate's receipts he held possession of them as owner, and pledged them in that capacity to *C*. *Moyce* v. *Newington, 4 Q. B. D. 32*, relied on. *Clive Jute Mills* v. *Ebrahim Arab, I. L. R. 24 Calc. 177, Pease* v. *Gloahec, L. R. 1 P. C. 219*, referred to. *Mirabita* v. *Imperial Ottoman Bank, 3 Ex. D. 164*, distinguished *Held* further, that the pledge by *A* to *C* did not come within the proviso to s. 178 of the Contract Act. JUGGERNATH AUGURWALLAH *v* SMITH (1906).

I. L. R. 33 Calc. 547

——— *Right to rescind contract—Contract Act (IX of 1872), s. 39.*—*A* agreed to purchase from *B* under two contracts 300 tons of sugar to be delivered at different dates. *A* having failed to take delivery under the first contract, *B* claimed to rescind both the contracts. *Held*, that as there was no refusal on the part of *A* within s. 39 of the Contract Act, *B* was not entitled to rescind the second contract. *Sooltan Chand* v. *Schiller. I. L. R. 4 Calc. 252*, relied on. Though the English law does not govern this case, the views of the learned Judges in the following English cases would serve as useful guides in determining what amounts to a refusal. *Freeth* v. *Burr, L. R. 9 C. P. 208. The Mersey Steel and Iron Company, Limited,* v. *Naylor Benson & Co., 9 App. Cas. 434*, referred to. RASH BEHARY SHAHA *v.* NRITTYA GOPAL NUNDY (1906) . . **I. L. R. 33 Calc. 477**

CONTRACT—*continued.*

——— *Construction—Custom of trade in Bombay—Vendor and purchaser—Principal and agent—Goods ordered nett free godown—No remuneration fixed—Variance between printed and written terms—Liability to account.*—The plaintiffs sued to recover the balance due to them for goods delivered by them to the defendant under certain indents, the first clause of the printed portion of which ran as follows:—"$\frac{\text{We}}{\text{I}}$ hereby request and authorize you to order, and if possible, buy and send $\frac{\text{us}}{\text{me}}$ the undermentioned goods on $\frac{\text{our}}{\text{my}}$ account and risk and $\frac{\text{we}}{\text{I}}$ bind $\frac{\text{ourselves}}{\text{myself}}$ to pay for the same at the prices and conditions specified below." Other printed clauses provided that goods were to be landed by the defendant, who was to pay the import duty; the plaintiffs were not to be liable for damages though they might have advised the defendant of having placed the order, or any portion of it; the liability of the sellers and buyers, respectively, was to be the same as though a separate contract had been made out and signed in respect of each instalment, insurance was to be effected in Europe and the plaintiffs were to be free of all responsibility regarding it; the plaintiffs were not to be bound by any clauses or customs not specifically mentioned in the indent; and anything written in the indent form by the buyers in any language, other than English, except their signature, was to be null and void. To this indent form the following matter, *inter alia*, was added in writing:—"12 Cases Ea/contg. 18 Pcs. of 25/130 yds. Plain Velvet 1421/18 at 1*s.* 9*d.* per yard. Nett free godown including duty. 60 days. 6 per cent. Int. after due date." The plaintiffs brought out the goods referred to in the indents and the defendant took delivery of a portion of the same, but refused to take delivery of the remainder. The defendant contended, by way of defence and counter-claim, that the plaintiffs were his commission agents for the purpose of purchasing goods in the European markets, and that they were bound to furnish an account of the difference, if any, between the cost price of the goods and the price mentioned in the indents. The lower Court, by an interlocutory judgment, held that the relation between the parties was that of principal and agent, and ordered the plaintiffs to furnish an account. The plaintiffs appealed. On appeal the preliminary objection was taken that the lower Court had erred in excluding

evidence as to the custom of trade in Bombay. By an order dated the 7th March 1904 the suit was referred back to the lower Court in order that such evidence might be taken. On further hearing, after such evidence was taken: *Held*, that there was an inconsistency between the printed and the written provisions of the indent. The print, however, could not be discarded, but it was necessary to discover the real contract of the parties from the printed as well as from the written words." *Gumm* v. *Tyrie*, *33 L J. (Q. B.) 97, 111*, followed. *Held*, also, that according to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe, at a fixed price, nett free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant. PAUL BEIER *v.* CHOTALAL (1904). **I. L. R. 30 Bom. 1**

——— *Pakki Adat—Incidents of the custom—Employment for reward.*—The plaintiffs in Bombay bought and sold in Bombay cotton and other products on the orders of the defendant who traded at Shahada in Khandesh. In respect of the transactions sued on the plaintiffs before due date had entered into cross contracts of purchase with the merchants to whom they had originally sold goods on the defendant's account. The transactions were entered into on *pakki adat* terms. The contract of a *pakka adatia* in the circumstances of this case is one whereby he undertakes or guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted or differences paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference. The evidence in the case establishes the following propositions in connection with *pakki adat* dealings:—(1) That the *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant and that no contractual privity is established between the up-country constituent and the Bombay merchant. (2) That the up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby for practical purposes cancel the same. (3) The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent. *Held*, that the defendant knew of the custom, which was not unreasonable as it did not involve a conflict between the *pakka adatia's* interest and duty. BHAGWANDAS *v.* KANJI (1905). **I. L. R. 30 Bom. 205**

CONTRACT ACT (IX OF 1872).

——— **s. 16.**

See DISQUALIFIED PROPRIETOR. **10 C. W. N. 849**

CONTRACT ACT (IX OF 1872)—*continued.*

——— **ss. 16, 74**—*Mortgagor and mortgagee Undue influence—Act VI of 1899, ss. 2, 4—Stipulation for increased interest—Compound interest—Penalty—Rate of compensation—Transfer of Property Act, ss. 86, 88—Six per cent on amount found due.*—Where in a suit to enforce two mortgage-bonds there was no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money: *Held*, that this circumstance is not sufficient of itself to place the mortgagees in a position to "dominate the will" of the mortgagor within the meaning of s. 16 of the Contract Act, 1872, as amended by Act VI of 1899, s. 2. *Dhanipat Das* v. *Maneshar Bakhsh Singh*, *L. R. 33 I. A. 118*, distinguished. In default of payment of interest, both bonds stipulated that additional interest should be paid by the mortgagor from the date of their execution, both by increase of the general rate and by the increased rate of the compound interest; but at the date of the execution of the second bond there was a settlement of accounts as regards the interest due on the first bond and simple interest only was charged, the amount being included in the principal of the second bond:—*Held*, that the stipulation for increased interest being retrospective and not merely from the date of default was a penalty within the meaning of s. 74 of the Contract Act as amended by Act VI of 1889, s. 4; but that under the Act reasonable compensation not exceeding the amount of the penalty was payable by the mortgagor. Their Lordships approved the concurrent findings of both Courts that the compensation should be at the same rate as the increased interest stipulated for; and also the direction of the High Court that in the case of the first bond and in the case of the second bond it should run from the date of default of that bond, compound interest being allowed only at the rate at which simple interest was stipulated for. *Held*, also on the true construction of ss. 86, 88 of the Transfer of Property Act and the Rules of Court made under s. 104 the High Court was right in allowing 6 per cent. interest only and not the mortgage rate of interest on the aggregate amount found due from the date fixed for redemption until realization. SUNDAR KOER *v.* SHAM KRISHEN (1903) . **L. R. 34 I. A. 9**

s.c. I. L. R. 34 Calc. 150

——— **s. 20.**

See ADMINISTRATION BOND. **10 C. W. N. 623**

——— **ss. 20, 59, 142, 143.**

See ADMINISTRATION BOND. **I. L. R. 33 Calc. 137**

See REVENUE SALE LAW (ACT XI OF 1859), ss. 28, 30.

——— **s. 23.**

See ASSIGNMENT . **10 C. W. N. 755**

See CONTRACT . **I. L. R. 33 Calc. 702**

CONTRACT ACT (IX OF 1872)—*continued.*

——— s. 23—*Contract—Agreement opposed to public policy—Promissory note given for repayment of money in respect of which a criminal prosecution might possibly have lain.*—Where a *bond fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor by a third party as security for the debt constitutes a valid agreement. *Keir* v. *Leeman, L. R. 9 Q. B. 371, 392: 72 R. R. 298; Flower* v. *Sadler, L. R. 10 Q. B. D. 572,* and *Kessowji Tulsidas* v. *Hurjivan Mulji, I. L. R. 11 Bom. 566,* referred to. JAI KUMAR *v.* GAURI NATH (1906).

I. L. R. 28 All. 718

——— s. 28.

See ARBITRATION.

I. L. R. 33 Calc. 1169

——— s. 30—*Wagering contracts—Agreement to pay differences—Surrounding circumstances—Form of contract not of moment—Bombay Act III of 1865.*—The law which is contained in s. 30 of the Contract Act (IX of 1872) and in Bombay Act III of 1865, is that the Court must not only consider the terms in which the parties have chosen to embody their agreement, but must look to the whole nature of the transaction or institution, whatever it may be, and must prove among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions, which might in certain events become operative, to compel the passing of property though neither party anticipated such a contingency. The Court should be astute to discover what in fact was the common intention of both parties, and should do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain. MOTILAL *v.* GOVINDRAM (1905).

I. L. R. 30 Bom. 83

——— s. 39.

See CONTRACT . **I. L. R. 33 Calc. 477**

——— ss. 46, 49, 94—*Commission agent—Place of payment of debt—Cause of action—Jurisdiction—Letters Patent, clause 19.—Held,* that where no specific contract exists as to the place where the payment of the debt is to be made, it is clear, it is the duty of the debtor to make the payment, where the creditor is. MOTILAL *v.* SURAJMAL (1904) . . . . **I. L. R. 30 Bom. 167**

——— s. 59.

See SALE . . **10 C. W. N. 948**

——— s. 65—*Limitation Act (XV of 1877), Sch. II, Art. 97—Contract—Failure of consideration—Suit to recover money paid—Limitation.*—One Farzand Ali negotiated on behalf of his wife, Najm-un-nissa, a mortgage for R26,000 in favour of Jamna Das. This mortgage included two items, one of R3,403-11-6 and the other of R679-10-6. The former was a debt due by Farzand Ali to Jamna Das, for which Farzand Ali represented his wife was willing to become security; the latter was a sum taken by Farzand Ali in cash on the representation that it would be paid by him to the mortgagor on suit by the mortgagee for recovery of the mortgage-money. The first Court decreed the plaintiff's claim in full; but on appeal the High Court exonerated the mortgagor from payment of the two sums mentioned above. After the death of Farzand Ali the mortgagee sued the representatives of Farzand Ali for recovery of these two items. *Held,* that the mortgagee had a good cause of action in respect of which limitation only began to run from the date of the decree of the High Court, which decided that the sum claimed could not be recovered from Najm-un-nissa as part of the mortgage debt. *Bassu Kuar* v. *Dhum Singh, I. L. R. 11 All. 47,* followed. JAMNA DAS *v.* NAJM-UN-NISSA BIBI (1906).

I. L. R. 28 All. 466

——— s. 69—*United Provinces Land Revenue Act (III of 1901), ss. 183 and 233—Suit to recover money paid to release property from unlawful attachment—Jurisdiction—Civil and Revenue Courts.*—The plaintiff sued in a Civil Court to recover money from the defendants on the allegation that certain property belonging to her having been wrongfully attached in order to realize arrears of Government revenue due from the defendants, she, the plaintiff, had, in order to save her own property, paid the arrears of revenue due from the defendants to Government. *Held,* that the cause of action was a good cause of action having regard to s. 69 of the Contract Act, 1872, and that the jurisdiction of the Civil Courts to entertain the suit was not ousted by the provisions of the United Provinces Land Revenue Act, 1901, ss. 183 and 233 (*m*). *Smith* v. *Dinonath, I. L. R. 12 Calc. 213,* and *Bama Sundari Dasi* v. *Adhar Chunder, I. L. R. 22 Calc. 28,* referred to by BANERJI, *J.* TULSA KUNWAR *v.* JAJESHAR PRASAD (1906) . . . . **I. L. R. 28 All. 563**

——— s. 74—*Penalty—Interest—Stipulation to pay higher rate—Rate originally contracted for—Subsequent reduction.*—A sum of money was borrowed at a certain rate of interest. Subsequently on a settlement of account between the parties, it was agreed that a lower rate of interest would be chargeable on the amount remaining due, if paid within a certain date; but, if not so paid, the higher rate originally contracted for would be payable. *Held,* that the stipulation for the payment of interest at the higher rate cannot be regarded as a penalty, that being the rate originally contracted for. Where the parties are *sui juris* and there is no question of fraud or oppression or improper dealing or undue influence, they are competent to make and must stand by their own bargain. KIRTI CHUNDER CHATTERJEE *v.* ATKINSON (1906).

10 C. W. N. 640

CONTRACT ACT (IX OF 1872)—*continued.*

——— s. 74.

See ADMINISTRATION BOND.

———*Interest—High rate—Penalty.*—A stipulation for the payment of interest at the rate of R75 per cent. per annum from the date of the bond, on failure to pay the principal amount in two instalments on dates as fixed in the bond, was held in the circumstances of the case to be a penalty. It is open to a Court to consider the facts and circumstances of each case and determine whether a stipulation for a high rate of interest is or is not a penalty, its finding on the question being rather a finding of fact than of law. MIAJAN PATARI *v.* ABDUL JUBBAR (1906) . . . **10 C. W. N. 1020**

——— **s. 74, Expl., Effect of**—*Mortgage—Simple mortgage, personal liability under, exists unless special contract to the contrary—Absence of specific prayer in plaint no ground for refusing appropriate relief—Delay no abandonment of right.*—In the case of simple mortgages, the personal liability of the mortgagor exists, unless there is a specific contract to the contrary. *Wahid-un-Nissa* v. *Gobardhan Das, I. L. R. 22 All. 453, 461,* referred to. Where the plaint asks for a decree against the defendants as members of the family and 'for such other relief as the Court may think fit,' the Court ought to grant the plaintiff such appropriate relief as he is entitled to and such relief cannot be refused on the ground that there is no specific prayer for such relief. Though it is within the scope of the authority of the managing member of a Hindu family to execute the mortgage so as to bind the family assets, the plaintiff in a suit on such mortgage is not entitled to a personal decree against a defendant member of the family who is not a party to the mortgage in respect of the money alleged to be in his hand. Mere delay by the plaintiff in suing to enforce a contract is no evidence of an intention not to enforce its terms. Under the explanation to s. 74 of the Indian Contract Act, it is for the Court to decide on the facts of the particular case whether a stipulation for increased interest from the date of default is or is not a stipulation by way of penalty. It was not the intention of the Legislature to enact that such stipulations are always to be considered penal. The explanation was simply intended to meet the decisions in which it was held that such stipulations are not penal and must be enforced. ABBAKE HEGGADETHI *v.* KINHIAMMA CHETTY (1906) . . . . **I. L. R. 29 Mad. 491**

——— s. 74—*Not applicable to forfeiture of deposits—Forfeiture, no relief against, if amount reasonable.*—Neither s. 74 of the Contract Act, nor the principles of law laid down in decisions dealing with *promises to pay specified sums* in case of breach of contract apply to cases of forfeiture of deposits for breach of stipulations even when some of them are but trifling, while others are not such. *Wallis* v. *Smith, L. R. 21 Ch. D. 243 at p. 258.* In such cases the rule is that where the instrument refers to a sum deposited as security for performance the forfeiture will not be interfered with, if reason able in amount. *Srinivasa* v. *Rathnasabapathi, I. L. R. 16 Mad. 474,* not followed. MANIAN PATTER *v.* MADRAS RAILWAY COMPANY (1906). **I. L. R. 29 Mad. 118**

CONTRACT ACT (IX OF 1872)—*concluded.*

——— ss. 77, 78, 82, 83, 88, 178.

See CONTRACT . **I. L. R. 33 Calc. 547**

——— ss. 143, 144.

See ADMINISTRATION BOND.

10 C. W. N. 673

——— ss. 187, 188.

See PRINCIPAL AND AGENT.

——— ss. 240, 245.

See PARTNERSHIP . **10 C. W. N. 313**

CONTRACT, EFFECT OF.

See RIGHT OF OCCUPANCY.

I. L. R. 33 Calc. 136

CONTRIBUTION.

——— suit for.

See ACT XV OF 1877, SCH. II, ARTS. 99 AND 132 . . **I. L. R. 28 All. 743**

See ACT IX OF 1887.

I. L. R. 28 All. 292

CONVEYANCE.

See EVIDENCE ACT.

I. L. R. 30 Bom. 911

See EXECUTION OF DECREE.

10 C. W. N. 345

CONVICTION.

See CRIMINAL PROCEDURE CODE.

COPYRIGHT.

See COPYRIGHT ACT.

COPYRIGHT ACT (XX of 1847).

——— ss. 6 and 14—*"Person aggrieved"—Summary proceedings—Infringement—The Press and Registration of Books Act (XXV of 1867), s. 18—Catalogue of Books kept at Bombay—Charter Act (24 and 25 Vict. cap. 104), s. 14—Letters Patent, s. 36—Jurisdiction of the High Court of Calcutta, Original Side—Evidence by affidavits.*—On an application under s. 6 of the Indian Copyright Act of 1847 by the assignee of the copyright in certain books for an order that the entry registering the name of another person as proprietor of the copyright in the same books be expunged from the Catalogue of books kept at Bombay under Act XXV of 1867: *Held,* that s. 18 of Act XXV of 1867 did not oust the

COPYRIGHT ACT (XX OF 1847)—*concluded.*

jurisdiction of the Supreme Court of Calcutta vested in it by s. 6 of the Indian Copyright Act of 1847, that the High Court of Calcutta as the direct successor of the Supreme Court is invested with all its powers and functions, and that a Judge sitting on the Original Side under s. 14 of the Charter Act has jurisdiction to dispose of an application under s. 6 of the Indian Copyright Act of 1847 to expunge an entry from the Catalogue of Books kept at Bombay under Act XXV of 1867. *Held*, "the proprietor of a copyright is a person aggrieved" within the meaning of s. 6 of Act XX of 1847, when another person gets his name registered in a Catalogue of Books in fraud of the proprietor's rights. If a case of this sort is clear upon the merits, the Court is justified in disposing of it upon evidence by affidavit. *Held*, that an application under s. 6 of Act XX of 1847 is a "summary proceeding in respect of an infringement of copyright" within the meaning of s. 14 of the Act, and the omission to make an entry of the applicant's name as proprietor of the copyright in the Book of Registry at the office of the Secretary of the Home Department of India, before commencing proceedings, constitutes a bar to the application. ABDOOLLA BHAY SARAFALLI *v.* ISMAIL BIN SHEIKH BADAI (1905).

I. L. R. 33 Calc. 571
s.c. 10 C. W. N. 134

——— **s. 14**—*Act XXV of 1867—Law under s. 14 of Act XX of 1847 same as law in England—No copyright in published work, except where copyright registered and subsists.*—The law as settled in England is that in the case of a book which has been published, there is no right to sue for piracy, except where the copyright is registered and subsists under statutory provisions. Copinger on 'Copyright,' pp. 29 and 33, referred to. *Macklin* v. *Richardson* and *Gaubaud* v. *Wallace* (*7 Ruling Cases, 66 at pp. 67, 70 and 128* respectively), referred to. The law is the same in India. The proviso to s. 14 of Act XX of 1847 has not effected any change in the law as stated above and does not protect copyright in published works when not registered under Act XX of 1847 or Act XXV of 1867. *Macmillan* v. *Suresh Chandra Deb*, *I. L. R. 17 Calc. 951*, distinguished. SARAPATHI MUDALIAR *v.* SEETHARAMIAH (1906) . **I. L. R. 29 Mad. 292**

CO-SHARER LANDLORD.

See BENGAL TENANCY ACT, s. 188.
10 C. W. N. 787

——— **decree against r ecorded tenant.**

See LANDLORD AND TENANT.
10 C. W. N. 1

See RENT . . **10 C. W. N. 108**

——— *Co-sharer landlord—Decree for rent against registered tenant—Private sale of tenant's interest prior to suit—Sale in execution of decree, if affects the purchaser's rights.*—When certain co-sharer landlords instituted a suit for the rent of a jote, making all persons interested in the

CO-SHARER LANDLORD—*concluded.*

jote parties defendants, and obtained a decree, a sale in execution of the decree passed the entire jote to the purchaser. But a sale in execution of a decree for rent obtained by the same landlords in a suit subsequently instituted against the purchaser, but after the latter had parted with his interest in the jote to a third party, did not affect the rights acquired by such third party by his purchase. The fact that such third party had not got his name registered in the zamindar's sherista, in place of the first purchaser was immaterial as at the second auction-sale only the right, title and interest of the judgment-debtor was sold. UMESH CHANDRA ROY *v.* GOUR LAL CHAUDHURY (1906) **10 C. W. N. 1042**

——— *Rent, suit for—Co-sharer landlords—Separate collection, effect of—Right to sue jointly for whole rent—Implied contract.*—From the mere fact that co-sharer landlords have for a long period collected their shares of the *jama* separately, it cannot be inferred that the parties contracted that separate collection should go on for ever. There is nothing, therefore, to prevent the co-sharer landlords from joining to sue for the whole rent. *Guni Mohamed* v. *Moran*, *I. L. R. 4 Calc. 96*; *Gopal Chunder Das* v. *Umesh Narain Chowdhury*, *I. L. R. 17 Calc. 695*; *Pramada Nath Roy* v. *Romani Kant Roy*, *9 C. W. N. 34*; *Shyama Charan Bhattacharya* v. *Akhoy Kumar Mitter*, *10 C. W. N. 787*; *Girish Chandra Mukhopadhya* v. *Chhatradhar Ghosh*, *3 C. L. J. 379*, referred to. AKSHOY KUMAR MITRA *v.* GOPAL KAMINI DEBI (1906).

10 C. W. N. 952
s.c. I. L. R. 33 Calc. 1011

CO-SHARERS.

——— *Enjoyment of joint property—Right to joint possession—Suit relating to the joint property—Exclusion of a co-sharer is denial of his right.*—The defendants had, in defiance of the rights of the plaintiff, who was their co-sharer, seized possession of land appertaining to the joint estate; they were not cultivating any part of the land or carrying on any work thereon inconsistent with the joint possession of the plaintiff, nor had they improved the lands by spending labour and capital thereon, nor was there any acquiescence by the plaintiff. *Held*, that even if the defendants had originally taken possession of the land for the purpose of cultivating indigo, that purpose having come to an end they were not entitled to continue in exclusive possession of the land and that the plaintiff was entitled to recover joint possession. It would be subversive of the right of joint owners to hold that it is open to any co-sharer, who may appear first on the field, to seize possession of any land newly formed by accretion to the joint estate and hold it to the permanent exclusion of the other co-sharers. *Watson & Co.* v. *Ram Chund Dutt*, *I. L. R. 18 Calc. 10*: *L. R. 17 I. A. 110*, *Lachmeswar Singh* v. *Manowar Hossein*, *I. L. R. 19 Calc. 253*: *L. R. 19 I. A. 48*, and *Madan Mohun Shaha* v. *Rajab Ali*, *I. L. R. 28 Calc. 223*, referred to and distinguished. SURENDRA NARAIN SINGHA *v.* HARI MOHAN MISSER (1906) . . . **I. L. R. 33 Calc. 1201**

COSTS.

——— *Solicitor's lien for costs—Summary jurisdiction of Court over suitors—Compromise by parties without knowledge of solicitor—Solicitor's right to oppose motion—Negotiable security—Transfer of negotiable security by debtor to his creditor—Effect.*—By a private compromise between Cullianji the plaintiff in the first suit, and Lakshmibai, the 6th defendant, who was also the plaintiff in the second suit, it was agreed that the plaintiff should give to Lakshmibai certain immoveable property and R15,853 in full settlement of her claim and a further sum of R500 from her solicitor's costs. On the 21st February 1904, possession of the immoveable property was given and a sum of R500 paid to Lakshmibai. Cullianji also gave to her 3 hundis for R5,000, R5,000 and R5,853 respectively, but the hundis were dishonoured on their due dates. In March and April 1904, the plaintiff paid 2 sums of R5,000 to Lakshmibai by cheque, in lieu of the 2 hundis for R5,000. On the 4th June 1904, Lakshmibai's solicitor gave notice to the plaintiff, that he had a lien for costs on the sum of R15,853 agreed to be paid by the plaintiff to his client. On the 22nd of June 1904, the plaintiff paid the sum of R5,853 to Lakshmibai, in cash, in respect of the hundi for R5,853, which was dishonoured. The plaintiff, thereupon, moved for an order, authorizing the delivery to him of certain property, alleging that he had settled and satisfied the claims of Lakshmibai. Lakshmibai's solicitor opposed the motion on the ground that the settlement and satisfaction were collusive transactions intended to cheat him out of his costs and asked the Court to order the plaintiff to deposit the sum of R9,000 as security for the same. *Held*, that in the absence of fraud or collusion between the parties, the solicitor was entitled to be paid his taxed costs, by the plaintiff, up to R5,853 being the amount paid by the plaintiff after notice of the lien. The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs; and in enforcing it the Court must be guided by the principles of English law. Whether the solicitor moves the Court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction. *Devkabai* v. *Jefferson, Bhaishankar and Dinsha, I. L. R. 10 Bom. 248*, and *Khetter Kristo Mitter* v. *Kally Prosunno Ghose, I. L. R. 25 Calc. 887*, followed. *Ramdoyal Serowgee* v. *Ramdeo, I. L. R. 27 Calc. 939*, dissented from. *Held*, also, that the giving of a negotiable security by the plaintiff to Lakshmibai operated as a conditional payment only and not as a satisfaction of the debt. *In re Romer and Haslam, L. R. 2 Q. B. 286 at p. 296*, followed. CULLIANJI v. RAGHOWJI (1904) . I. L. R. 30 Bom. 27

COSTS OF COMMISSIONER.

See CIVIL PROCEDURE CODE.

COUNSEL.

See PRACTICE.

COUNTERFEITING TRADE MARK.

See CAUSE OF ACTION.

COURT.

See DECREE . I. L. R. 33 Calc. 306

COURT ACTING AS ARBITRATOR.

See AGREEMENT.

COURT-FEES.

See CIVIL PROCEDURE CODE.
10 C. W. N. 199, 857

See MORTGAGE.

10 C. W. N. 1010

——— *Memorandum of appeal—Appeal from an order directing an award to be filed—Decree—Court-fees Act (VII of 1870), Sch. I, Art. 1.*—On an application to file an award made on a reference to arbitration without the intervention of a Court a decree was made to the effect that the plaintiff do recover a certain sum of money as awarded by the arbitrator. *Held*, that an order directing such an award to be filed is a decree and an appeal from such an order is an appeal from a decree and ought to bear a Court-fee in accordance with Art. I, Sch. I of the Court-fees Act. *Ghulam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167*, followed; decision of OLDFIELD, J., in *Dayanand* v. *Bakhtawar Sing, I. L. R. 5 All. 338*, approved; *Upadhya Thakur* v. *Persidh Singh, I. L. R. 23 Calc. 723*, distinguished. HARI MOHAN SINGH v. KALI PROSAD CHALIHA (1905) . . . I. L. R. 33 Calc. 11

——— *Court-fees—Set-off claimed in a written statement.*—Where in a suit for rent the question was as to whether defendant was entitled to claim a deduction on account of payment made by him for cesses payable by the plaintiff on account of years previous to those for which rent was claimed, *Held*, that the payment cannot be treated as part payment of the rents sued for, but as an antecedent debt. The claim was, therefore, in the nature of a set off and Court-fees must be paid for the same. *Dictum of* BANERJEE, *J.*, in *Fakir Chandra Dutta* v. *Messrs. Gisborne & Co., 8 C. W. N. 174*, not followed. GUISE v. ANANTA RAM RATHI (1905) . . . 10 C. W. N. 199

——— *Ad valorem fee chargeable on appeals against decrees under s. 330 of the Code of Civil Procedure.*—Where a claim under s. 330 of the Code of Civil Procedure has been registered as a suit, an appeal against the decree directing delivery of property in such suit ought to be stamped with an *ad valorem* fee. BALASUNDRA MUDELLY v. RAJALINGAM CHETTIAR (1905) I. L. R. 29 Mad. 172

COURT-FEES ACT (VII OF 1870).

——— ss. 7, sub-s. (v) and (vi) and 12—*Court-fees—Pre-emption—Valuation of suit—Appeal—General Clauses Act (X of 1897)*

COURT-FEES ACT (VII OF 1870)—*continued.*

s. 3 (59).—*Held*, that the expression "the year next before the date of presenting the plaint" occurring in clause (*c*) of sub-s. (*v*) of s. 7 of the Court-fees Act, 1870, denotes a period of 365 days reckoning backwards from the date of presentation of the plaint. *Held*, also, that where a Court had based its decision as to the valuation of a suit upon a wrong construction of the expression "the year next before the date of presenting the plaint," an appeal was not precluded by s. 12 of the Court Fees Act, 1870. GHASI RAM *v.* HAR GOBIND (1906).
I. L. R. 28 All. 411

——— s. 7 (e), cl. IX, and Art. I of Sch. I—*Does the Act apply to appeals in mortgage suits—Court-fee payable on subject-matter in dispute in the appeal.*—S. 7 (*e*), clause IX of the Court-fees Act, applies only to "suits" and not to appeals. In the case of appeals in mortgage suits Article I of Schedule I of the Act applies. The Court-fee in such cases is payable on the value of the subject-matter in dispute in the appeal and not of the subject-matter in dispute in the suit. *Nepal Rai* v. *Debi Prasad, I. L. R. 27 All. 447*, followed. *Amar Khan* v. *Mahomed Khan, I. L. R. 10 Bom. 41*, dissented from. REFERENCE UNDER COURT-FEES ACT, 1870 (1906) . I. L. R. 29 Mad. 367

——— ss. 10 and 12—*Court-fee—Procedure—Second appeal—Appeal to lower Appellate Court by respondent in High Court insufficiently stamped.*—Where it was discovered in second appeal in the High Court that the respondents, when appellants in the lower Appellate Court, had not paid a sufficient Court-fee on their memorandum of appeal in that Court, and up to the date of the hearing of the plaintiffs' appeal in the High Court, though called upon to do so, had not made good the deficiency, it was *held* that the proper procedure was not to dismiss the respondents' appeal to the lower Appellate Court, but to stay the issuing of the decree, if any, of the High Court in favour of the respondents until such time as the additional Court-fee due by them might be paid. *Narain Singh* v. *Chaturbhuj Singh, I. L. R. 20 All. 362*, followed. *Madan Lal* v. *Jai Kishan Das, Weekly Notes, 1905, p. 277*, overruled. MOHAN LAL *v.* NAND KISHORE (1905) . . I. L. R. 28 All. 270

——— s. 11—*Past and future mesne profits—Civil Procedure Code (Act XIV of 1882), ss. 209, 211, 212.*—Where a plaint asked for past as well as future mesne profits and an amount was claimed and Court-fees paid for past mesne profits only. *Held*, that s. 11 of the Court-fees Act applied. *Ram Krishna Bhikaji* v. *Bhimabai, I. L. R. 15 Bom. 46, Chedi Lal* v. *Kirath Chand, I. L. R. 2 All. 682*, and *Kewal Kisan Singh* v. *Sookhari, I. L. R. 24 Calc. 178*, referred to. There is no analogy between interest awarded under s. 209 of the Code and mesne profits claimed and awarded under ss. 211 and 212. Interest may be awarded under s. 209 as an inducement to prompt satisfaction of the decree and as a penalty for non-compliance with it. Such interest is no part of the claim or relief granted as in the case of mesne profits. DWARKA NATH BISWAS *v.* DEBENDRA NATH TAGORE (1906).
I. L. R. 33 Calc. 1232

——— s. 28—*Civil Procedure Code, s. 54—Suit filed on last day of limitation on an insufficient Court-fee—Limitation.*—When by a mistake of the plaintiff, and not of the Court or of any officer of the Court, a plaint was filed upon an insufficient Court-fee and this was not discovered until after the period of limitation for the suit had expired, it was *held* that the suit was barred. *Munro* v. *The Cawnpore Municipal Board, I. L. R. 12 All. 57, Muhammad Ahmad* v. *Muhammad Sirajuddin, I. L. R. 23 All. 423, Balkaran Rai* v. *Gobind Nath Tiwari, I. L. R. 12 All. 129*, and *Jagram* v. *Chatarpal, Weekly Notes, 1904, 133*, followed. *Valambal Ammal* v. *Vythilinga Mudaliar, I. L. R. 24 Mad. 331*, dissented from. RAM TAHAL SINGH *v.* DUBRI RAI (1905) I. L. R. 28 All. 310

——— Sch. I, Art. 1.

See VALUATION OF SUITS.
I. L. R. 33 Calc. 1133

——— Sch. I, Art. 1.

See COURT-FEE . I. L. R. 33 Calc. 11

——— Sch. II, Art. 17 (vi)—*Court-fee—Suit to recover possession of share in immoveable property after partition.*—Where on the face of the plaint it appeared that the suit was in fact a suit to establish the plaintiff's title to a one-third share in certain property and to recover possession of the same, a claim for partition being added to make the relief sought effectual, it was *held* that an *ad valorem* fee was payable on the plaint and not a fee of Rs10 as provided by Article 17, clause vi, of the second schedule to the Court-fees Act. *Balvant Ganesh* v. *Nana Chintamon, I. L. R. 18 Bom. 209*, followed. *Kirty Churn Mitter* v. *Aunath Nath Deb, I. L. R. 8 Calc. 757*, referred to. WALI-ULLAH *v.* DURGA PRASAD (1906) . I. L. R. 28 All. 340

COURT OF WARDS.

See COURT OF WARDS ACT.

See DISQUALIFIED PROPRIETOR.

COURT OF WARDS ACT (BENGAL ACT IX OF 1879).

——— ss. 14, 39—*Manager—Lease granted or renewed by manager—Presumption.*—A lease granted by a manager under the Court of Wards cannot be held to be void on the ground that there is no evidence to show that he had granted it under the orders of the Court. *Held* by RAMPINI, *J.*, that under ss. 14 and 39 of the Court of Wards Act (Bengal Act IX of 1879), the manager had a *primâ facie* right to grant the lease, and that it must be presumed that he had the sanction of the

COURT OF WARDS ACT (BENGAL ACT IX OF 1879)—*concluded.*

Collector, under whose authority he must have acted. *Held* by MUKERJEE, *J.*, that a lease granted by a manager without the orders of the Court is only voidable at the option of the ward, and a lease which in fact was necessary for the good management of the ward's property, is not vitiated merely by reason of the absence of the orders of the COURT. UMA CHURN MAHALDAR *v.* NARENDRA NATH BASU (1906)

I. L. R. 33 Calc. 273
s.c. 10 C. W. N. 126

COURT SALE.

See CIVIL PROCEDURE CODE.
I. L. R. 30 Bom. 575

CO-WIDOWS.

See HINDU LAW. **I. L. R. 30 Bom. 431**

See MITAKSHARA. **I. L. R. 30 Bom. 333**

CREDITOR.

See RECEIVER . **I. L. R. 33 Calc. 1175**

See WAKFNAMA . . **10 C. W. N. 560**

CRIMINAL PROCEDURE CODE (ACT V OF 1898).

See COMPLAINT.

——— **s. 4**—*Appeal lies against order made under s. 22 of the Cattle Trespass Act.*—By s. 4 (*o*) of the Code of Criminal Procedure, the word 'offence' includes an act in respect of which a complaint may be made under s. 20 of the Cattle Trespass Act; and a person against whom an order under s. 22 of the Cattle Trespass Act is made is a "person convicted on a trial" and is entitled to appeal under s. 407 of the Code of Criminal Procedure. IN THE MATTER OF PONNUSAMI (1901).
I. L. R. 29 Mad. 517

——— **ss. 4 and 476**—*Jurisdiction—"Judicial proceeding"—Inquiry into petition against subordinate official.—Held*, that an inquiry conducted by a Magistrate into the truth of allegations against a subordinate official contained in a petition presented to a Deputy Commissioner is a judicial proceeding within the meaning of s. 4 (*m*) of the Code of Criminal Procedure. *Hara Charan Mookerji* v. *The King-Emperor, I. L. R. 32 Calc. 867*, distinguished. EMPEROR *v.* KUNA SAH (1905).
I. L. R. 28 All. 89

——— **ss. 30, 494.**

See PARDON.
I. L. R. 33 Calc. 1353

——— **s. 106**—*Appellate Court cannot bind over to keep peace when lower Court not one of the class referred to in the section, and no breach of the peace committed.*—An accused person cannot be bound over to keep the peace under s. 106 of the Code of Criminal Procedure, unless he is convicted of an offence of which a breach of the peace is a necessary ingredient and unless it is found that a breach of the peace has actually occurred. An Appellate Court cannot exercise the power under the section when the accused has not been convicted by a Court such as is referred to in the section. MUTHIAH CHETTI *v.* EMPEROR (1905) . **I. L. R. 29 Mad. 190**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*continued.*

——— **ss. 107 and 145**—*Attempt to eject by force a person in possession of immovable property — Jurisdiction — Procedure.* — Where certain persons wrongfully and without any *bonâ fide* claim to possession, sought to eject another by force from the possession of certain land, and a breach of the peace was imminent, it was *held* that a Magistrate might legally take action against the aggressors under s. 107 of the Code of Criminal Procedure, and it was not necessary, on the finding that their claim was not *bonâ fide*, to take proceedings under s. 145 of the Code. EMPEROR *v.* RAM BARAN SINGH (1906) . **I. L. R. 28 All. 406**

——— **s. 110.**

See FURTHER ENQUIRY.
I. L. R. 33 Calc. 8

——— **s. 110**—*Security for good behaviour—Subsequent conviction—Forfeiture of bond—Imprisonment for unexpired portion of the period, for which security had been given.—Held*, that where a person has given security for good behaviour and his security is subsequently forfeited the amount of his forfeited bond may be exacted, but he cannot be also committed to prison for the unexpired portion of the term for which security had been taken. EMPEROR *v.* JAGDEO SINGH (1906).
I. L. R. 28 All. 629

——— **ss. 110, 118**—*Security for good behaviour—Fresh proceedings taken immediately after the period of a previous security bond has expired—Locus pœnitentiæ.*—Ranjit was bound over to be of good behaviour for a period of three years, which term expired on the 13th of June 1905. On the 20th of June 1905 fresh proceedings were started against him under s. 110 of the Code of Criminal Procedure. *Held*, that the interval was not long enough to give Ranjit any opportunity of showing that he was willing to adopt an honest livelihood, and that evidence relating to events prior to the 13th of June 1905 was inadmissible in support of a fresh order under s. 110. *Emperor* v. *Husain Ahmad Khan, Weekly Notes, 1905, p. 34*, followed. EMPEROR *v.* RANJIT (1905).
I. L. R. 28 All. 306

——— **s. 133**—*Order for removal of obstruction on public land—Defence raising question of title—Procedure.*—When in a matter under s. 133 of the Code of Criminal Procedure the person called upon to show cause raises a question of title it is for the trying Magistrate to decide whether the question so raised is raised *bonâ fide*. But the trying Magistrate ought not to go further and decide whether the

CRIMINAL PROCEDURE CODE (ACT V. OF 1898)—*continued.*

title set up does or does not exist. EMPEROR *v.* DOST MUHAMMAD (1905) . **I. L. R. 28 All. 96**

——— **s. 145.**

See POSSESSION . **I. L. R. 33 Calc. 33**

——— **s. 145**—*Definition—"Crops or other produce of land"—Crops severed from the land not within the definition—Jurisdiction.—Held,* that the words "crops or other produce of land" as used in s. 145 (2) of the Code of Criminal Procedure do not include crops, which have been severed from the land upon which they grew. A Magistrate has therefore no jurisdiction to attach under s. 146 of the Code a crop of mahua no longer growing on the trees. *Ramzan Ali* v. *Janardhan Singh, I. L. R. 30 Calc. 110,* followed. CHAURASI *v.* RAMA SHANKAR (1905) . . . **I. L. R. 28 All. 266**

——— **s. 145 (*1*).**

See BREACH OF THE PEACE.
I. L. R. 33 Calc. 352

——— **s. 145, cls. 1, 3.**

See POSSESSION . **I. L. R. 33 Calc. 68**

——— **s. 145**—*Enquiry to be held before issuing preliminary order under—Jurisdiction of Magistrate—Failure of jurisdiction where Magistrate refuses to receive evidence which party is entitled to adduce under s. 145 (5).*—In order that a Magistrate may have jurisdiction to act under s. 145 of the Code of Criminal Procedure, he must be satisfied from a Police report, or other information, that a dispute likely to cause a breach of the peace exists concerning any land, etc. Where there is no Police report the statement of interested parties ought to be received with great caution and ought not to be acted upon, unless they are corroborated by the testimony of less interested persons. The opposite party also ought to be given an opportunity of cross-examining the party making such statements before the Magistrate takes any action on them. Under s. 145 of the Code of Criminal Procedure, a party, who is required by a preliminary order to attend at the Magistrate's Court, is entitled to show that no dispute likely to cause a breach of the peace exists or had existed, and it is not open to such Magistrate to refuse to receive such evidence, when tendered. Where the Magistrate refuses to receive such evidence, his order will be set aside as having been passed without jurisdiction. *Per* DAVIES, *J.*—A Magistrate acts *ultra vires* in clubbing together disputes relating to a large number of villages and treating them as one. Each village must stand on its own footing and the Magistrate should satisfy himself that a dispute existed in respect of all the villages. He should ascertain, as regards each village, which party was in possession at the date of the order and confirm that possession. The object of Chapter XIV of the Code of Criminal Procedure being to procure prompt action to avert breaches of the peace, the Legislature could not have contemplated under that chapter wholesale proceedings in regard to a large number of villages

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*continued.*

which, if the procedure above stated be adopted, would entail a prolonged enquiry. KUMARA TIRUMALRAJA *v.* SOWCAR LODD, GOVIND DOSS KRISHNA DOSS (1906) . . . . **I. L. R. 29 Mad. 561**

——— **s. 145**—*Dispute concerning land—Omission to publish a copy of the initiatory order at or near the subject of dispute—Jurisdiction—Procedure—Criminal Procedure Code (Act V of 1898), s. 145, cls. (1) and (3)—Revision—Power of High Court to interfere in revision—Prejudice—Charter Act (24 and 25 Vict., c. 104), s. 15.* Where the Magistrate drew up an initiatory order under s. 145, cl. (1) of the Criminal Procedure Code, but omitted to direct the publication of a copy of it at or near the subject of dispute, and it was not so published in accordance with cl. (3) of that section:—*Held,* that the provisions as to the publication of a copy of the order in s. 145, cl. (3) of the Code, is directory, and relates to a matter of procedure only and not of jurisdiction. That if cl. (1) of s. 145 has been complied with, the Magistrate has jurisdiction to deal with the case, and the mere fact that he omitted to have a copy of such order published by affixing it to some conspicuous place at or near the subject of dispute does not deprive him of jurisdiction, but is an irregularity in his procedure. The power of interference of the High Court in cases under s. 145 of the Code is only under s. 15 of the Charter Act. It is discretionary and ought in such cases to be exercised with every caution. Where a lower Court has proceeded with irregularity the High Court should not interfere, unless it can be shown that some one has been materially prejudiced by such irregularity. If, however, the subordinate Court has acted without jurisdiction, the High Court will interfere. Where the parties were duly served and appeared and the case was contested before the Magistrate, and it was only subsequently discovered by searching the records that a copy of the initiatory order had not been published locally, and where it was not suggested that any one had been in the least prejudiced by the omission, it was *held* that the High Court ought not to interfere under s. 15 of the Charter Act. *Per* GHOSE, *J.*—The Magistrate acquires jurisdiction when the conditions of cl. (1) have been fulfilled and cls. (3) and (4) lay down the procedure by which the jurisdiction is to be exercised, but the procedure prescribed is mandatory and not simply directory. When a Magistrate fails to comply with cl. (3) he does not act without jurisdiction, but illegally in the exercise of his jurisdiction, and the High Court has the power to interfere under the Charter Act. But such non-compliance is not an illegality, which makes it obligatory upon the Court to interfere, unless some prejudice to any party has been thereby occasioned. *Jasu Manjhi* v. *Mandruddin, 8 C. W. N. 590, Nawab Khajah Solemollah* v. *Ishan Chandra Das, 9 C. W. N. 909,* and *Hari Kishen Bhagat* v. *Kashi Prosad Singh, Unreported Cr. Rev. 472 of 1905,* overruled. SUKH LAL *v.* TARA CHAND TA (1905).
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CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*continued.*

——— s. 147—*Construction of the words "concerning any land"—Landlord and tenant—Right of tenant to enclose cultivable land by a wall.*—The enclosing by a tenant of cultivable lands by a wall instead of a hedge is not *primâ facie* an interference with the landlord's rights and ought not to be interfered with under s. 147 of the Code of Criminal Procedure by a Magistrate, being a matter to be settled by a Civil Court. In such cases, if a breach of the peace is apprehended, security must be taken from the party in possession. The words "concerning the use of land" in s. 147 of the Code of Criminal Procedure cannot be qualified, and the section construed as if it contained words that the user to which the dispute relates is a user by a party other than the party in possession. *The Empress* v. *Ganapat Kalwar, 4 C. W. N. 779,* not followed. *Subba* v. *Trincal, I. L. R. 7 Mad. 461,* referred to and followed. ARUNACHELLAM CHETTIAR v. CHIDAMBARAM CHETTI (1905).

I. L. R. 29 Mad. 97

——— s. 147—*Dispute as to right to use a mosque within the section—Charter Act, s. 15.*—An order, under s. 147 of the Code of Criminal Procedure, declaring possession to be with a certain person is illegal when there has been no enquiry as to the party in possession and will be set aside under s. 15 of the Charter Act. A dispute as to the right to use a mosque between persons claiming to be entitled to officiate as Kazi therein is a dispute coming within s. 147 of the Code of Criminal Procedure. KADER BATCHA v. KADER BATCHA ROWTHAN (1905) . . **I. L. R. 29 Mad. 237**

——— s. 148 (3)—*Award of costs may be made within a reasonable time after disposal of the main question.*—An award of costs under s. 148 (3) of the Code of Criminal Procedure should, in the usual course, be contemporaneous with the decision of the main question. Where, however, circumstances require the postponement of the award of costs, it should be made within a reasonable time after the disposal of the principal subject of the proceeding in the presence of both parties VYTHIANADA TAMBIRAN v. MAYANDI CHETTY (1906).

I. L. R. 29 Mad. 373

——— ss. 162, 172—*Evidence Act (I of 1872), ss. 145, 161—Statements of witnesses recorded by police officers—Police diaries.*—Oral statements of witnesses to a police officer, even though entered in the diary under s. 172 of the Criminal Procedure Code, are admissible under the provisions of s. 162 of that Code and of that section only, and the provisos as to the cross-examination of the police officer under ss. 161 and 145 of the Evidence Act, which refer to his own statements, do not apply to the statements of the witnesses. The proper procedure is for the accused, at the time the witness, whose statement is so recorded, appears before the Court, to ask the Court to refer to such writing, and, if necessary, furnish the accused with copies. It is open to the defence to ask the police officer or any other person whether certain statements were made to him by the witnesses for the purpose of impeaching their credit under s. 155 of the Evidence Act, but the police officer cannot be asked to refresh his memory from diaries, which are inadmissible, unless admitted under the provisions of s. 162 of the Code and used in the cross-examination of the witnesses. It would be quite improper to accept the police officer's perfunctory reading of his diary as proof of the statement. It is only when they have been properly brought in under the provisions of s. 162 that they can be subsequently proved by the police officer under the provisions of the Evidence Act, if the witness denies making them. But this does not authorize their use for the first time for the purpose of refreshing the police officer's memory. *In the matter of the petition of Kali Charan Chunari, I. L. R. 8 Calc. 154;* and *In the matter of the petition of Jhubboo Mahton, I. L. R. 8 Calc. 739,* referred to. DADAN GAZI v. EMPEROR (1906) . . . **I. L. R. 33 Calc. 1023**

——— ss. 191, 537—*Procedure—Omission of Magistrate to inform accused of his right to be tried by another Court—Illegality.*—The omission on the part of a Magistrate to inform an accused person to whom the provisions of s. 191 of the Code of Criminal Procedure are applicable of his right to have the case tried by another Court amounts to more than a mere irregularity to which s. 537 of the Code will apply; but a Magistrate taking cognizance of an offence under s. 190, cl. (*c*), of the Code is not competent to try the case unless and until he has informed the accused, before taking any evidence, that he is entitled to have his case tried by another Court. EMPEROR v. CHEDI (1905).

I. L. R. 28 All. 212

——— s. 195—*Sanction to prosecute, notice of application for sanction—Practice.*—When an application is made to a Court under s. 195 of the Code of Criminal Procedure for sanction to prosecute, although it is not legally necessary that notice of such application should be given to the opposite party before orders are passed thereon, nevertheless it is highly desirable that such notice should be given. *Pampapati Sastri* v. *Subba Sastri, I. L. R. 2 Mad. 210; In re Bal Gangadhar Tilak, 4 Bombay Law Reporter 750; Mangar Ram* v. *Behari, I. L. R. 18 All. 358,* and *Maula Bakhsh* v. *Niazo, Weekly Notes, 1904, p. 171,* referred to. INAYAT ALI v. MOHAR SINGH (1905).

I. L. R. 28 All. 142

——— ss. 195 (1), cl. (b), 432, 433 (1).

See SANCTION TO PROSECUTE.

I. L. R. 33 Calc. 193

——— ss. 195 and 439—*Civil Procedure Code, s. 622—Revision—Sanction to prosecute—Jurisdiction.*—Where sanction to prosecute is granted under the provisions of s. 195 of the Code of Criminal Procedure by a Civil Court, the High Court has no jurisdiction in the exercise of its revisional powers on the Criminal side to interfere with such an order. *Nasir Hasan* v. *Dost*

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Muhammad, I. L. R. 26 All. 1, overruled. *In the matter of the petition of Bhup Kunwar, I. L. R. 26 All. 249; In re Chennana Goud, I. L. R. 26 Mad. 139; Flower* v. *Lloyd, L. R. 6 Ch. D. 297*, and *Diss Urban Sanitary Authority* v. *Aldrich, L. R. 2 Q. B. D. 179*, referred to by KNOX, *J.* SALIG RAM *v.* RAMJI LAL (1906).

I. L. R. 28 All. 554

——— **s. 195, cls. 6, 7**—*Appeal against order of District Court granting sanction—Power of High Court on such appeal.*—An appeal lies to the High Court against an order of the District Judge granting sanction under cls. 6 and 7 of s. 195 of the Code of Criminal Procedure. Where such order has revoked the sanction granted by the Munsif for prosecution under certain sections of the Penal Code, but granted sanction to prosecute under other sections, it is competent to the High Court on appeal, therefrom, not only to revoke the sanction granted, but also to grant the sanction refused. KANNAMBATH IMBICHI NAIR *v.* MANATHANATH RAMAR NAIR (1906) **I. L. R. 29 Mad. 122**

——— **ss. 195, 537**—*Sanction, want of, only an irregularity and not fatal to the prosecution.*—The general provisions of s. 195 of the Code of Criminal Procedure ought not to be so construed as to nullify the special provisions of s. 537 (*b*). The want of sanction required by s. 195 of the Code of Criminal Procedure is not fatal to a prosecution, unless the accused is prejudiced thereby. *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar, I. L. R. 22 Calc. 176*, dissented from. ISMAL ROWTHER *v.* SHUNMUGAVELU NADAN (1905) . . . . **I. L. R. 29 Mad. 149**

——— **s. 203**—*Dismissal of complaint no bar to Magistrate rehearing complaint.*—On a reference by the Sessions Judge as to whether it was competent to a Magistrate, after dismissing a complaint under s. 203 of the Code of Criminal Procedure, to rehear the complaint, when such order of dismissal had not been set aside by a higher Court: *Held*, (SUBRAHMANIA AYYAR and DAVIES, *JJ.*, dissenting) that the dismissal of a complaint, under s. 203 of the Code of Criminal Procedure does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority. *Mahomed Abdul Mannan* v. *Pandu-ranga Row, I. L. R. 28 Mad. 256*, dissented from. *Dwarka Nath Mondul* v. *Bani Madhab Banerjee, I. L. R. 28 Calc. 652*, approved and followed. *Mir Ahwad Hossein* v. *Mahomed Askari, I. L. R. 29 Calc. 726*, approved and followed. *Per* SIR ARNOLD WHITE, *C. J.*—The power to enquire into an offence must be held to exist in a Magistrate until something has occurred to divest the Magistrate of this jurisdiction. An order under s. 203 of the Code of Criminal Procedure is not a judgment to which the provisions of s. 369 will apply. The principle of *autrefois acquit* will not apply as there is no trial when the complaint is dismissed under s. 203 of the Code of Criminal Procedure. The provisions of ss. 147, 400, 215 and 210 of the Code of Criminal Procedure of 1872 compared with the corresponding ss. 203, 403, 253 and 242 of the present Code. The alterations in the present Code in regard to the sections under consideration were merely drafting alterations and were not intended to effect and did not effect any alteration in the law as laid down by the old Code. *Per* BENSON, *J.*—The decisions in *Queen-Empress* v. *Adam Khan, I. L. R. 22 All. 106, Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee, I. L. R. 23 Calc. 983*, and *Mahomed Abdul Mennan* v. *Panduranga Row, I. L. R. 28 Mad. 255*, do not apply, as in those cases it was not the *same*, but a *different* Magistrate, who proceeded to rehear the complaint. There is no bar under the Code to the complaint being reheard, unless the proceedings have reached such a state of finality that an acquittal or an order operating as such under the Code is recorded. *Per* MOORE, *J.*—The maxim *nemo bis vexari* has no application to an order under s. 203 of the Code of Criminal Procedure, though it may be a good argument, where an accused has been discharged under ss. 253 and 259 of the Code. *Per* SUBRAHMANIA AYYAR, *J.*—Although the technical doctrine of *autrefois acquit* will apply only to acquittals, the principle underlying such doctrine, that a person should not, in respect of an offence, be in jeopardy of prosecution more than once, applies to cases where the prosecution failed to reach the stage of acquittal without any fault on the part of the accused, unless its application is precluded by the provisions of the Code. Acquittal in common law means an acquittal after verdict or sentence. The Legislature having by ss. 333, 494 and 248 of the Code of Criminal Procedure given the term a wider significance, the explanation to s. 403 was intended to guard against the term being applied to cases where the plea of *autrefois acquit* was not technically applicable and not to bar the application of the aforesaid analogous principle, where justice required it. There being thus no legal provision to the contrary, an order dismissing a complaint or discharging the accused must, on the above principle, operate as a bar to further enquiry into the same matter as long as such order remains in force. Orders under ss. 203, 253 and 259 of the Code of Criminal Procedure stand on the same footing as regards the application of this doctrine. There is no inherent power in a Magistrate to revise his own order of dismissal or discharge. EMPEROR *v.* CHINNA KALIAPPA GOUNDEN (1905).

I. L. R. 29 Mad. 126

——— **ss. 203, 437 and 439**—*Complaint, dismissal of—Presidency Magistrate—Jurisdiction of High Court to order further enquiry on the merits—Charter Act (24 and 25 Vict., c. 104), s. 15.*—Where a complaint has been dismissed by a Presidency Magistrate under s. 203 of the Criminal Procedure Code, the High Court has no power to direct a further enquiry under ss. 437 and 439 of the Code, but only under s. 15 of the Charter Act (24 and 25 Vict., c. 104). The question of the propriety or the impropriety of the order of dismissal

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*continued.*

does not strictly come within the authority vested in the Court thereunder. DEBI BUX SHROFF *v.* JUTMAL DUNGARWAL (1906).

I. L. R. 33 Calc. 1282

——— **ss. 222, 234**—*Criminal breach of trust—Joinder in one trial of charges for two distinct items with another for a gross sum is not illegal—Construction of statute*—Under s. 222 of the Code of Criminal Procedure a charge of criminal breach of trust in respect of a gross sum, without specifying the items, is a charge for one offence within the meaning of s. 234. S. 222 of the Code of Criminal Procedure does not apply only to cases where there is a general deficiency and the prosecution is unable to specify the particular items of the deficiency, but also to cases where the items may be, but are not, specified. The joinder in one trial of charges of criminal breach of trust in respect of two distinct items with a charge in respect of a gross sum (the items constituting which may be, but are not specified) is a joinder of only three charges, and is not bad as contravening the provisions of s. 234 of the Code of Criminal Procedure. "The essence of a code is to be exhaustive on the matter in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the enactment according to its true construction." *Subramania Aiyar* v. *King-Emperor, I. L. R. 25 Mad. 61,* distinguished. THOMAS *v* EMPEROR (1906).

I. L. R. 29 Mad. 558

——— **ss. 222, 239**—*Successive breaches of trust—Joinder of charges—Joint trial—Same transaction—'Transaction,' meaning of.*—Where the accused persons were jointly in charge of trust funds, so that one could not act without the connivance of the other and each of them misappropriated sums of money from the trust funds to his own use, thus evidently carrying through their object in concert, the fact that they carried out their scheme by successive acts done at intervals, alternately taking the benefits, did not prevent the unity of the project from constituting the series of acts one transaction, *i.e.*, the carrying through of the same object which both had from the first act to the last: and there was no objection to their being tried jointly at one trial. S. 222 of the Criminal Procedure Code (Act V of 1898) clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. The section does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification; it does not prohibit enumeration of the particular items in the charge. S. 239 of the Criminal Procedure Code (Act V of 1898) admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of s. 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenour of the acquisition and not the wording of the charge that must be considered as the test. In s. 239 of the Code, a series of acts separated by intervals of time are not excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal, this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible. The foundation for the procedure in s. 239 is the association of two persons concurring from start to finish to attend the same end. No doubt, if it were attempted to associate in the trial a person, who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done, then that would be outside the provisions of the section. "Transaction" means "carrying through" and suggests not necessarily proximity in time, so much as continuity of action and purpose. EMPEROR *v.* DATTO (1905) . . . **I. L. R. 30 Bom. 49**

CRIMINAL PROCEDURE CODE ACT V OF 1898)—*continued.*

——— **ss. 227, 233, 234**—*Joinder of more than three offences in one trial illegal—Trial not validated by striking out charge to cure such defect after case closed, though before judgment—Penal Code—(Act XLV of 1860), ss. 478, 480—Offence of using false trademark—No acquisition of the trademark in the sense used in the English Act necessary under s. 478 of the Penal Code.*—A person selling soap not manufactured by *P*, in a box which bears the name of *P* as a soap manufacturer, uses a false trademark and is guilty of an offence under s. 480 of the Penal Code. It is not necessary to constitute an offence under s. 473 that trademark in the sense in which the word is used in the English Patents, Designs and Trademarks Acts should have been acquired; and the mark is none the less a false mark because it appeared on the box and not on the goods Under ss. 233 and 234 of the Code of Criminal Procedure, a person cannot be charged with more than three offences at one trial; and the defect cannot be cured, after the accused had pleaded and the case had closed, by amending the charges so as to reduce it to three offences. Although the words in s. 227 of the Code of Criminal Procedure are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment, the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed and after the mischief which the Legislature intended to guard against had been done. *Subrahmania Aiyar* v. *King-Emperor, I. L. R. 25 Mad. 61,* referred to and explained. MANAVALA CHETTY *v.* EMPEROR (1906).

I. L. R. 29 Mad. 569

——— **ss. 233, 239, 234.**

See JOINT TRIAL. **I. L. R. 33 Calc. 292.**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*continued.*

——— **ss. 239, 537.**

See JOINT TRIAL.

I. L. R. 33 Calc. 1256

——— **ss. 243, 252**—*Trial of a warrant case as a summons case not a mere irregularity.*—Where a Magistrate in trying a warrant case does not adopt the course prescribed by s. 252 of the Code of Criminal Procedure, but convicts the accused on his own admission without taking evidence and without framing a formal charge, such procedure is not a mere irregularity and the conviction will be set aside. EMPEROR *v.* CHINNAPAYAN (1906).

I. L. R. 29 Mad. 372

——— **ss. 250, 423** (1) (d)—*Frivolous complaint—Compensation—Appeal—Powers of Appellate Court.—Held*, that an Appellate Court is not empowered to grant compensation under s. 250 of the Code of Criminal Procedure, in view of the express terms of s. 250, "Magistrate by whom the case is heard." S. 423 (1) (*d*) cannot be taken to confer such power. BALLI PANDE *v.* CHITTAN (1906) . . . . **I. L. R. 28 All. 625**

——— **s. 288**—*Evidence—Statements made before Magistrate retracted before Court of Session.*—In a capital case certain witnesses, who had stated before the committing Magistrate that they had seen the accused striking the deceased, withdrew their statements before the Court of Session and gave evidence exculpating the accused. The Sessions Judge, considering the evidence given before him by these witnesses to be untrue and acting under s. 288 of the Code of Criminal Procedure, admitted in evidence the statements of these witnesses made before the committing Magistrate. *Held*, that such statements were rightly admitted and when admitted were on the same footing as the other evidence on the record. *Queen-Empress* v. *Dhan Sahai, I. L. R. 7 All. 862, Queen-Empress* v. *Jeochi, I. L. R. 21 All. 111, Queen-Empress* v. *Jawahir, Weekly Notes, 1888, p. 356, Queen-Empress* v. *Nirmal Das, I. L. R. 22 All. 445*, and *Umar* v. *Empress, 22 Panj. Rec., Cr. J.,132*, referred to. EMPEROR *v.* DWARKA KURMI (1906) . **I. L. R. 28 All. 683**

——— **ss. 289, 292**—*Adducing evidence—Documents put in during cross-examination by the accused of witnesses for the Crown—Right of reply.*—During the cross-examination of a witness for the Crown certain documents were put in evidence, by Counsel for the accused, which were not part of the record sent up to the Court by the committing Magistrate. No witnesses were called for the defence. The Crown claimed the right of reply. *Held*, that as the documents put in during the cross-examination of a witness for the Crown were tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross-examination, they must be regarded as evidence adduced by the accused, and that therefore the Crown had the right of reply. EMPEROR *v.* BHASKAR (1906).

I. L. R. 30 Bom. 421

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*continued.*

——— **s. 307**—*Procedure of High Court on reference under—'Opinion' of jury, what is.*—Where the Sessions Judge disagreeing with the jury, refers a case to the High Court under s. 307 of the Code of Criminal Procedure, the High Court is to form its own opinion on the evidence. The 'opinion' of the jury in s. 307 of the Code of Criminal Procedure is the conclusion of the jury, and not the reasons on which that conclusion is based. *Per* SIR SUBRAHMANYA AYYAR, *Offg. C. J.*, and BODDAM, *J.*—In references under s. 307 of the Code of Criminal Procedure, although it may be expedient to have before the Court the reasons of the jury for the view taken by them, when any have been given, the circumstance that no such reasons have been ascertained does not warrant this Court to decline to go into the evidence and to arrive at its own judgment, after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused. EMPEROR *v.* CHELLAN (1905).

I. L. R. 29 Mad. 91

——— **ss. 337, 338**—*Accomplice—Pardon—Grant of conditional pardon—The pardoned accomplice giving full and true story of the crime, but retracting it in cross-examination before the Sessions Court—Order of Sessions Court to committing Magistrate to withdraw the pardon—Forfeiture of pardon—Trial of accused for the offence—Commitment—Conviction on his plea of guilty—Irregularity—Illegality—Practice and Procedure.*—The accused was one of several persons accused of murder. He accepted a tender of pardon made to him by the committing Magistrate on the conditions set out in s. 337 of the Criminal Procedure Code. He was examined as a witness for the Crown before the committing Magistrate, and he made a full and true disclosure of the whole of the circumstances within his knowledge relating to such offence. He repeated them in his examination-in-chief before the Sessions Judge, but resiled from his statements in cross-examination. At the conclusion of the trial, in which the accomplices were convicted of murder, the Sessions Judge sent the pardoned accomplice in custody to the committing Magistrate with an order directing that he should be committed for trial for the same murder. The Magistrate accordingly withdrew the pardon and committed the accused to the Sessions Court to take his trial for the murder aforesaid. The Sessions Judge convicted the accused of murder on what was described as his plea of guilty and he was sentenced to transportation for life. On appeal, *Held*, by ASTON, *J.*, that the Sessions Judge had no authority under the Code of Criminal Procedure to order the accused to be committed for trial for the murder in respect of which a pardon had been tendered; and further, that the accused's trial was conducted with material irregularity, which seriously prejudiced the accused and occasioned a failure of justice. *Held*, by BEAMAN, *J.*, that the Sessions Judge, who presided at the first trial, had no power to make the order purporting to have been under s. 339 of the Criminal Procedure

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*continued.*

Code, directing the commitment of the accused on the ground that he had forfeited his pardon; and that the procedure adopted was both wrong and illegal. Per ASTON, *J.*—It is open to a pardoned accomplice, if placed on trial as an accomplice, who has *forfeited* the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered. S. 339 of the Criminal Procedure Code does not enact that a person who has accepted a tender of pardon, renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence; what the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made. *Per* BEAMAN, *J.*—At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon, whether he had or had not made a full and true disclosure of the whole facts. And where after having admittedly done that he had at a later stage recanted, that recantation amounted to giving false evidence within the meaning of s. 339 of the Criminal Procedure Code, and worked a forfeiture of the pardon. EMPEROR v. KOTHIA (1906) . . **I. L. R. 30 Bom. 611**

——— s. **344**—*Adjournment of Criminal case—Power of Court to order costs of the day to be paid by the party for whose benefit an adjournment is granted.—Held*, that a Magistrate in granting an adjournment under the provisions of s. 344 is competent under the same section to order the costs of the day to be paid by the party in whose favour the order for adjournment is made. *Shew Prosad Poddar* v. *The Corporation of Calcutta, 9 C. W. N. 18*, followed. *King-Emperor* v. *Chhubraj Singh, Weekly Notes, 1902, p. 59*, discussed and doubted. MATHURA PRASAD v. BASANT LAL (1905) . . . . **I. L. R. 28 All. 207**

——— s. **362**—*Recording of evidence by a Presidency Magistrate.*—A Presidency Magistrate is bound to record evidence only in cases coming under s. 362 of the Criminal Procedure Code (Act V of 1898). He is not bound to record evidence in any summons cases or warrant cases or cases in which enquiries have to be made as in summons cases or warrant cases, except where he may impose a fine exceeding two hundred rupees or imprisonment for a term exceeding six months. It is, however, desirable that he should keep some record of the statements made by witnesses or that his judgment should indicate what those statements are, so that the High Court as a Court of revision may judge of the propriety or legality of the order passed by him. *Schein* v. *Queen-Empress, I. L. R. 16 Calc. 199*, referred to. SHEIK BABU v. EMPEROR (1906). **I. L. R. 33 Calc. 1036**

——— s. **403**—*Charge of an offence under s. 414 of the Penal Code—Previous conviction under s. 411 in respect of other property stolen at the same time and from the same person.—Held*, that where a person had been convicted under s. 411 of the Penal Code in respect of certain property stolen on a particular occasion from a particular person, he could not subsequently be tried for an offence under s. 414 of the Code in respect of other property stolen on the same occasion from the same person. *Queen-Empress* v. *Makhan, I. L. R. 15 All. 317*, referred to. EMPEROR v. MIAN JAN (1906) . . **I. L. R. 28 All. 313**

——— s. **421**—*Summary rejection of appeal.*—Where a petition of appeal signed by a pleader is presented to a Magistrate by the party in person, the appeal cannot be dismissed without giving the pleader a reasonable opportunity to appear. Where the conviction is based on the evidence of witnesses whose credibility is impeached by the accused on reasonable grounds, the appeal should not be summarily rejected under s. 421 of the Code of Criminal Procedure without sending for the records. RANGACHARLU v. EMPEROR (1905). **I. L. R. 29 Mad. 236**

——— s. **423**—*Order under directing payment of costs not an enhancement of sentence—Court-fees Act (VII of 1870).*—An order under s. 31 of the Court-fees Act directing the accused, on appeal against conviction, to pay the costs of the complainant is not an enhancement of the sentence. *Madan Mandal* v. *Haran Ghose, I. L. R. 20 Calc. 687*, approved. *Queen-Empress* v. *Tangavelu Chetty, I. L. R. 22 Mad. 153*, dissented from. EMPEROR v. KARUPPANA PILLAI (1905). **I. L. R. 29 Mad. 188**

——— ss. **423, 457, 537, cl. (a).**

See RIOTING . **I. L. R. 33 Calc. 295**

——— s. **437**—*Revision—Practice—Lower Court having concurrent jurisdiction in revision with the High Court.*—Where the Magistrate of the District dismissed a complaint under the provisions of s. 203 of the Code of Criminal Procedure, the High Court declined to entertain an application by the complainant asking for further inquiry under s. 437 of the Code, when no application for that object had been made to the Sessions Judge. *Emperor* v *Kalicharan, Weekly Notes, 1904, p. 232*, followed. GULLAY v. BAKAR HUSAIN (1905). **I. L. R. 28 All. 268**

——— s. **438**—*Revision—Practice—Sentence reduced by Sessions Judge—Application by Dis-*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*continued.*

trict Magistrate asking for enhancement.—As a general rule of practice the High Court will not entertain a reference from a District Magistrate, which has for its object the enhancement, of a sentence, which has been reduced by the Sessions Judge. *Queen-Empress* v. *Shere Singh, I. L. R. 9 All. 362, Queen-Empress* v. *Zor Singh, I. L. R. 10 All. 146,* and *Queen-Empress* v. *Jahandi, I. L. R. 23 Calc. 249,* referred to. EMPEROR *v.* JAMNA BAI (1905) . . . . **I. L. R. 28 All. 91**

——— **s. 476.**

See FALSE CHARGE.

I. L. R. 33 Calc. 30

See TRANSFER OF CRIMINAL CASE.

I. L. R. 33 Calc. 1183

——— **s. 476**—*Power to direct proceedings conferred on Court and not on Magistrate trying—Dismissal of complaint without adjudication no bar to proceedings under.*—The power to direct a prosecution under s. 476 of the Code of Criminal Procedure is conferred on the Court and not on the individual Magistrate, who tried the case. Such power is not ousted by the dismissal, without adjudication of a complaint by the party in respect of the same offence under a sanction previously given by the Court. RUNGA AYYAR *v.* EMPEROR (1905).

I. L. R. 29 Mad. 331

——— **ss. 476, 435, 439**—*Power of High Court to interfere in proceeding under s. 476—Madras Act III of 1869, scope of—Judicial Proceedings—Pleader, propriety of imputations made by.*—The High Court has power to revise proceedings under s. 476 of the Code of Criminal Procedure when such proceedings are null and void for want of jurisdiction. *Eranholi Athan* v. *King-Emperor, I. L. R. 26 Mad. 98,* referred to and distinguished. Madras Act III of 1869 does not authorise the issuing of summons in a departmental inquiry for bribery. The pendency of an appeal by the accused, who had paid the fine imposed on him, would not give any Court authority or power to arrest him or to take recognisances from him for appearing at any further enquiry. The presenting of a petition imputing improper motives to a Magistrate, who is illegally detaining a person to take recognisances from him to enforce his attendance for the foregoing purpose will not justify any action by such Magistrate under s. 476 of the Code of Criminal Procedure as the offence is not committed in the course of a *judicial proceeding,* nor is it brought to his notice in the course of such proceeding. SURYANARAYANA ROW *v.* EMPEROR (1905).

I. L. R. 29 Mad. 100

——— **ss. 517, 523**—*Sections not applicable, where there was no trial and no evidence recorded.*—When a person charged before the Magistrate with criminal breach of trust in respect of certain jewels died before trial and before any evidence was recorded and the alleged owner of the jewels, which were recovered by the Police from the pledgees and sent to the Magistrate along with the charge sheet, applied to be put in possession of them under ss. 517 and 523 of the Code of Criminal Procedure after enquiry as to their ownership. *Held,* that s. 517 of the Code of Criminal Procedure did not apply to the case. *Held,* further, that as there was no evidence or finding about ownership, s. 523 of the Code of Criminal Procedure did not apply and that the Magistrate was not bound to hold an inquiry simply to determine the ownership of the jewels. IN THE MATTER OF KUPPAMMAL (1906).

I. L. R. 29 Mad. 375

——— **s. 526**—*Reasonable apprehension in the mind of the accused—Incidents and circumstances calculated to create apprehension.*—A Magistrate is bound to postpone the hearing of a case for the purpose of enabling a party to apply to a higher Court for a transfer and his refusal to do so renders the subsequent proceedings voidable, if not void. *Queen-Empress* v. *Gayitri Prosunno Ghosal, I. L. R. 15 Calc. 455, Surat Lal Chowdhry* v. *Emperor, I. L. R. 29 Calc. 211,* and *Kishori Gir* v. *Ram Narayan Gir, 8 C. W. N. 77,* followed. If the words used by and the actions of a judicial officer, though susceptible of explanation and traceable to a superior sense of duty are calculated to create in the mind of the accused an apprehension that he may not have an impartial trial, the case should be transferred to some other Judge for trial. *Dhone Kristo* v. *King-Emperor, I. L. R. 31 Calc. 715,* and *Joharuddin* v. *Emperor, 8 C. W. N. 910,* referred to. Confidence in the administration of justice is an essential element in good government and a reasonable apprehension of failure of justice in the mind of the accused should be taken into consideration on an application for transfer. *Narain Chundra Banerjee* v. *The Howrah Municipality, 10 C. W. N. 441,* explained. *Held per* HOLMWOOD, *J.*—The case should be transferred in view of the technical objection that may be taken to the validity of the Magistrate's final decision, owing to his having refused time to apply for a transfer. The views of BRETT, *J.,* as expressed in *Narain Chundra Banerjee* v. *The Howrah Municipality, 10 C. W. N. 441,* concurred with. KALI CHARAN GHOSE *v.* EMPEROR (1906).

I. L. R. 33 Calc. 1183

——— **s. 528**—*Transfer—Penal Code, s. 193—False evidence—Affidavit of accused person in support of an application for transfer.*—*Held,* that where an accused person applies for the transfer of the case pending against him to some other Court, supporting his application by an affidavit, he cannot, or at least ought not to be prosecuted under s. 193 of the Indian Penal Code in respect of statements made therein. *In the matter of the petition of Barkat, I. L. R. 19 All. 200,* followed. EMPEROR *v.* BINDESHRI SINGH (1906).

I. L. R. 28 All. 331

——— **ss. 528 and 537**—*Transfer—Notice—Reasons for transfer not recorded, the transfer being obligatory—Police officer against whom a*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*concluded.*

complaint was made called upon to submit an explanation.—A complaint was made in the Court of a Deputy Magistrate accusing a Sub-Inspector of Police of offences under ss. 323 and 384 of the Penal Code. The Deputy Magistrate brought the complaint to the notice of the District Magistrate, who, without recording his reasons for so doing, but in obedience to an order of Government, transferred the case to his own file. The District Magistrate also called upon the officer accused to report as to any reason which he knew for the complaint having been made against him. This report was placed on the record, and was used, as the Magistrate stated in his order, to supply grounds for cross-examining the witnesses produced by the complainant. *Held*, that omission on the part of the Magistrate to record his reasons for transferring the case was not under the circumstances more than an irregularity, and that his action in calling for a report from the Sub-Inspector and the use made of that report were not improper. *Baidya Nath Singh* v. *Muspratt, I. L. R. 14 Calc. 141*, dissented from. *Held* also, that where a District Magistrate transfers a case from the file of a Subordinate Magistrate to his own, it is not necessary that he should issue notice to the complainant before doing so. DUKHI KEWAT, IN RE (1906) . . . I. L. R. 28 All. 421

——— s. 562—*Power conferred by section not confined to Courts of first instance.*—The power of passing orders under s. 562 of the Code of Criminal Procedure is not confined to Courts of first instance. *Emperor* v. *Birch, I. L. R. 24 All. 306*, approved. NARAYANASWAMI NAIDU v. EMPEROR (1906) . I. L. R. 29 Mad. 567

CROWN DEBT.

See CIVIL PROCEDURE CODE.

CUSTOM.

See CIVIL PROCEDURE CODE.

See COPYRIGHT ACT, s. 6. 10 C. W. N. 134

See HINDU LAW . I. L. R. 28 All. 170

See MAHOMEDAN LAW. I. L. R. 28 All. 496

See MORTGAGE . 10 C. W. N. 778

See PENAL CODE.

See PRACTICE . 10 C. W. N. 280

See PRE-EMPTION. I. L. R. 28 All. 434, 688

See RYOT.

CUSTOM OF TRADE.

See CONTRACT. I. L. R. 30 Bom. 1, 205

CUTCHI MEMONS.

——— *Succession—Marriage in approved form—Hindu Law.*—In the absence of proof of any special custom of succession, the Hindu Law of inheritance applies to Cutchi Memons. The legal consequences of the classes of marriage, the approved and disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not, and suggest the inference that it is the quality and not the form of marriage that decides the course of devolution; where the marriage is approved the husband and his side come in, where disapproved, they do not. *Ashabai* v. *Haji Tyeb Haji Rahimtulla, I. L. R. 9 Bom. 115*, followed. *In the goods of Mulbai Karim Khatav* v. *Pardhan Manji, 2 Bom. H. C. 276*, and *The case of the Khojahs and Memon Cutchis, 2 Morley's Dig. 431*, referred to. MOOSA HAJI JOONAS *v.* HAJI ABDUL RAHIM (1905). I. L. R. 30 Bom. 197

CUTCHI MEMONS—*concluded.*

——— *Succession—Hindu Law—Sons administering the property of their deceased father.*—Among the Kutchi Memons, who are governed by Hindu Law, the sons as heirs are entitled to the estate of their deceased father, subject to the payment of his debts. They are, therefore, entitled to take possession of their father's property, to administer it, and to pay debts without being liable to account to the Court otherwise than as heirs. *Veerasokkaraju* v. *Papiah, I. L. R. 26 Mad. 792*, followed. HAJI SABOO *v.* ALLY MAHOMED (1904). I. L. R. 30 Bom. 270

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DACOITY.

See PENAL CODE.

DAMAGES.

See CAUSE OF ACTION.

See JUDICIAL OFFICERS' PROTECTION ACT (1906) . . I. L. R. 30 Bom. 241

See LEASE . I. L. R. 33 Calc. 203

See TORT . . 10 C. W. N. 724

——— *Suit for damages for malicious prosecution—Commencement of prosecution bonâ fide—Continuance malo animo—Reasonable and probable cause—Question of fact.*—The plaintiff was a member of a joint Hindu family to which a house in Jambusar belonged. The tax in respect of this house fell into arrears. Summary proceedings before a Magistrate were instituted by the Municipality under the District Municipal Act. The amount was paid after the institution of the proceedings and the prosecution ended without a decision on the merits. The plaintiff brought this suit for damages for malicious prosecution against 5 defendants, namely, (1) the Municipality of Jambusar, (2) and (3) the members of its Managing Committee, (4) its Secretary, and (5) its Daroga. The first Court dismissed the suit. The lower Appellate Court passed a decree against defendants Nos. 1, 4 and 5 and awarded R55 as damages against them. On appeal to the High

DAMAGES—*concluded.*

Court—*Held*, that the suit should have been dismissed as against these defendants also, that the object of the Municipal Secretary being "to teach a minatory lesson to other defaulters on the disadvantages of non-payment of the tax", that could not be regarded as an indirect motive or as malice for the purposes of such a suit, it being a legitimate end of punishment to deter other evil-doers from offending in the same way. *Query.*—Whether in such circumstances the Municipality could in any case be held liable for the malice imputed to its Secretary. *Held*, further, that the Secretary was no party to the proceedings which were instituted by or on behalf of the Municipality. It was not in his power to determine whether proceedings should be instituted nor did he institute them in fact. *Held*, as to the *Daroga* that the facts failed to establish a sufficient ground for legal liability. Though a suit will lie for malicious continuation of proceedings, it was not shown that the *Daroga* took any active step after the payment or that he preserved *malo animo* in the prosecution or that he had the intention of procuring *per nefas* the conviction of the accused. *Fitzjohn* v. *Mackinder, 30 L. J. (C. P.) 257, 264*, followed. MUNICIPALITY OF JAMBUSAR *v.* GIRJASHANKER (1905) . **I. L. R. 30 Bom. 37**

DAMDUPAT.

See INTEREST . . **10 C. W. N. 884**

——— *Hindu Law—Interest—Interest accrued due not affected by the rule of damdupat.*—Plaintiff advanced R714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover R33-9-2, being the amount of interest over the amount from the date of the loan to the date of its repayment. The defendant raised the plea of *damdupat*, alleging that no sum was due as principal at the date of suit, so none could be recovered by way of interest. *Held*, that the claim should be allowed, since the rule of *damdupat* had no application to a right that has already accrued. The rule of *damdupat* does not divest rights that have accrued; it merely limits accruing rights. A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off. NUSSERWANJI *v.* LAXMAN (1906) . **I. L. R. 30 Bom. 452**

——— *Practice—Civil Procedure Code (Act XIV of 1882), ss. 351 and 352—Proof of claim in insolvency proceedings, effect of.*—An order admitting a creditor's claim made in insolvency proceedings, amounts to a decree and the rule of *damdupat* is not applicable to a claim so admitted. The rule of *damdupat* applies only during the existence of the relation of debtor and creditor, and ceases to apply when the contractual relation has come to an end by reason of a decree. HARI LAL MULLICK, IN THE MATTER OF (1906).
I. L. R. 33 Calc. 1269

DARKHAST RULES.

——— *Nature of grant—Power of Civil Courts to interfere where grant set aside by appellate authority on the ground of irregularity of procedure.*—*A* applied to the Tahsildar under rule IV of the Darkhast rules for a grant of land. The Tahsildar made the grant under rule VII on the 10th May 1897 and the grant stated that it was subject to the result of any appeal that might be preferred. On the 15th July 1897 and on the 2nd November 1897 two appeals were preferred to the Deputy Collector against the grant. On the 15th June 1898 the Deputy Collector issued a pottah to *A* in pursuance of the grant. The appeals were heard on the 28th June 1899, after notice to *A* and the grant by the Tahsildar was set aside on the ground that the notice under rule V was not duly published. *A* appealed to the Collector and to the Board of Revenue and his appeals were dismissed. The present suit was instituted *by A* for a declaration that the lands had become his property and that the Deputy Collector's order cancelling the grant was null and void or in the alternative for a decree directing the defendant to pay the kist paid by *A* and the cost of the improvements effected by him. The Court of first instance granted the declaration prayed for. On appeal the Subordinate Judge, holding that it was not open to the Civil Courts to question the propriety of the cancellation by the Deputy Collector, modified the decree by granting the alternative relief claimed in respect of kist and improvements. On appeal to the High Court, *Held*:—*per* SIR ARNOLD WHITE, *C. J.*—It is not open to a Civil Court to cancel a pottah because some of the formalities of the Darkhast rules have not been observed. It may, however, set aside an order of an Appellate Revenue Tribunal, which allows an appeal against a grant by a Revenue officer on the ground of irregularity of procedure, if it is of opinion that there is no evidence of irregularity, although it will not be open to the Civil Court to interfere, if the Tahsildar declined to make the grant on the ground of irregularity of procedure. In the former case there is a conditional contract, but in the latter there is no contract at all. *Per* BENSON, *J.*—Under the rules the Tahsildar has power only to make a conditional grant and the issue of a pottah does not alter the conditional nature of the grant. A pottah is in the nature of a mere bill and is not a grant or conveyance. It is not open to the Civil Courts to discuss the sufficiency or otherwise of the grounds on which the Darkhast authorities whether original or appellate grant or refuse to grant Government lands to parties applying for them, so long as those authorities act within the scope of the authority conferred on them by the rules. *The Secretary of State for India* v. *Kusturi Reddi, I. L. R. 26 Mad. 268*, referred to and approved. *Sappani Asari* v. *The Collector of Coimbatore, I. L. R. 26 Mad. 742*, referred to and approved. MUTHU VEERA VANDAYAN *v.* SECRETARY OF STATE FOR INDIA (1903).
I. L. R. 29 Mad. 461

DAYABHAGA.

See HINDU LAW.
I. L. R. 33 Calc. 1119

DEBT.

See HINDU LAW.
I. L. R. 33 Calc. 676

DEBTOR AND CREDITOR.

See LIMITATION ACT (XV OF 1877), s. 19.
I. L. R. 33 Calc. 1047

DEBUTTER.

See EVIDENCE ACT (I OF 1872), s. 9.
I. L. R. 33 Calc. 571

——— *Dedication—Precatory trust—Alienation of trust property—Mokurrari—Purchaser for value with notice of debutter—Character of property—Adverse possession—Limitation Act (XV of 1877), s. 10, and Sch. II, Arts. 134 and 144—Evidence Act (I of 1872), s. 90—Proper custody—Minerals.*—In the terms of a *sanad* granted in favour of the Mohunt of a Thakur, there was nothing to show that the properties, the subject-matter of the *sanad*, were dedicated to a God or Gods or that the income of the properties was to be applied in any other way than the personal enjoyment of the grantee: *Held*, that the mere fact that the document described itself as a *debutter* pottah and was addressed to the Mohunt did not suffice to constitute a valid dedication to the God, on whom the Mohunt attended. An expectation by the grantor that the profits of the property would, after satisfying the personal wants of the grantee, be devoted to the service of the God, whom he attended, would not constitute a valid dedication. *Ram Kanai Ghose* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, 2 C. L. J. 546*, referred to. The grant of a permanent *mokurrari* lease of *debutter* property is an alienation of proprietary interest *pro tanto*, and being beyond the competence of the trustee, possession under it becomes adverse to the lessor as from the date of the lease and a suit to recover possession by a successor of the trustee would be *primâ facie* governed by Art. 144 of Sch. II, Limitation Act, and would be barred, if not instituted within twelve years. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram, 4 C. W. N. 329*: *s.c. I. L. R. 23 Mad. 271*, followed. *The President and Governors of the Magdalen Hospital* v. *Knotts, L. R. 4 App. Cas. 324*, and *Attorney-General* v. *Davey, 4 de |Gex & Jones 136*, referred to. The effect of s. 10 read with Art. 134 of Sch. II of the Limitation Act is, that time is no bar to an action against the trustee himself, his representatives or assigns except an assign for valuable consideration, but as regards the latter the period of 12 years from the date of the purchase is to be the period within which the suit must be brought. A person, who takes a permanent *mokurrari* lease of *debutter* property for its full values, but with notice of its *debutter* character, is not precluded by the provisions of s. 10 and Art. 134 of Sch. II of the Limitation Act from pleading 12 years' limitation in a suit brought to recover it. *Radha Nath Das* v. *Gisborne & Co., 15 W. R. (P. C.) 24*, and *Ram Churn Tewary* v. *Protap Chandra Dutta Jha, 2 C. L. J. 449*, referred to.

DEBUTTER—*concluded.*

Ram Kanai Ghosh v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, 2 C. L. J. 546* approved. SHAMA CHARAN NANDI v. ABHIRAM GOSWAMI (1906) . . 10 C. W. N. 738
s.c. I. L. R. 33 Calc. 511

——— *Debutter property—Transferability—Shebait, trespass by—Decree for ejectment—Mesne profits—Liability of trust estate—Construction of decree—Execution—Joint decree-holders—Application by one when maintainable.*—Where one of several joint decree-holders made an application for the execution of the whole decree and alleged that the other decree-holders had assigned to him the interest of them all, and the latter also made an application intimating that they have no objection to the execution of the decree at the instance of their assignee, the applicant. *Held*, that the application was maintainable. *Per* RAMPINI, *J.*—A *debutter* property according to Hindu law is not absolutely inalienable, it can be alienated for legal necessity, and therefore, when a *shebait* as such trespasses on the property of another and so commits a tort and he is sued for and cast in damages, the *debutter* property can be sold in execution of such a decree. *Per* WOODROFFE, *J.*—As the decree in question appeared to have bound the trust estate the *debutter* property was liable. KRISHNA KISSORE CHAKRAVARTI v. SUKHA SINDHU SANYAL (1906).
10 C. W. N. 1000

DEBUTTER PROPERTY.

See HINDU LAW.
I. L. R. 33 Calc. 507

DECEPTION.

See CHEATING . I. L. R. 33 Calc. 50

DECLARATION.

See DISTRICT MUNICIPAL ACT.
I. L. R. 30 Bom. 409

DECLARATORY DECREE.

——— *Not to be given when suit is for cancellation and when no consequential relief prayed.*—A suit for cancellation of a mortgage deed on the ground of fraud must be dismissed in the absence of evidence of fraud and a decree declaring plaintiff's right to a smaller amount cannot be made when at the date of the plaint the plaintiff was entitled to consequential relief which he failed to claim. CHAKKA SUBBIAH v. MADDALI LAKSHMINARAYANA (1905).
I. L. R. 29 Mad. 298

DECREE.

See ARBITRATION.

See ATTACHMENT BEFORE JUDGMENT.
I. L. R. 33 Calc. 639

See CIVIL PROCEDURE CODE, s. 443.
I. L. R. 28 All. 137

DECREE—*continued.*

See COURT-FEE . I. L. R. 33 Calc. 11

See HINDU LAW.
I. L. R. 33 Calc. 676, 1119

See INTEREST . I. L. R. 33 Calc. 846

See JALKAR . I. L. R. 33 Calc. 15

See JOINT PROPERTY.
I. L. R. 28 All. 611

See JURISDICTION OF HIGH COURT.
I. L. R. 33 Calc. 180

See LEASE . I. L. R. 33 Calc. 862

See LIMITATION.
I. L. R. 33 Calc. 679

See PENSIONS ACT.
I. L. R. 30 Bom. 101, 506

See POSSESSION.
I. L. R. 33 Calc. 487

See RECEIVER . I. L. R. 33 Calc. 117

See SALE . I. L. R. 33 Calc. 283

See TRANSFER OF PROPERTY ACT, s. 90.
I. L. R. 33 Calc. 876
I. L. R. 28 All. 193

——— *Execution—Court—Joint decrees—Execution of land liability under—Application by one joint decree-holder for execution—Protection of interest of absent decree-holder—Notice—Civil Procedure Code (Act XIV of 1882), ss. 231, 260—Injunction.*—It is not obligatory upon the Court to issue a notice before making an order for execution under s. 231 of the Civil Procedure Code on the application of one of several joint decree-holders. Where in a contested suit a decree was made granting a perpetual injunction restraining a party from erecting a *pucca* building on a parcel of land and he in defiance of it erected a *pucca* building thereon: *Held*, that it was competent to the Court to make an order of attachment under s. 260 of the Civil Procedure Code against the judgment-debtor without previous service of notice upon him calling upon him to comply with the order contained in the decree. Whether notice should be issued before an order under s. 231 or s. 260 of the Civil Procedure Code is made must be left to be determined by the Court in consideration of the circumstances of each case. *Protap Chunder Dass* v. *Peary Chowdhrain, I. L. R. 8 Calc. 174*, explained: *Held*, also, that the Lower Court had rightly allowed the decree-holder to execute the decree by attachment, although he had applied for the demolition of the building. *Saka Lal* v. *Bai Parrati Bai, I. L. R. 26 Bom. 283*, referred to. *Per* MOOKERJEE, *J.*—When a judgment-debtor, who has had an opportunity of obeying an injunction, has wilfully failed to obey it, he is in substance guilty of a contempt of Court, and in such an event, the judgment may be enforced by imprisonment or attachment, but it is not necessary to give the judgment-debtor an opportunity to clear or purge his contempt. The practice to be followed in cases under s. 260 of the Civil Procedure Code discussed. DURGA DAS NANDI v. DEWRAJ AGARWALA (1905) . . . . I. L. R. 33 Calc. 306

DECREE—*concluded.*

——— *Deposit of decretal amount—Time fixed ending on a holiday—Payment on opening day—Decree at variance with compromise petition—Interpretation—Execution.*—If the law or a Court directs a thing to be done within a period fixed by it and it is impossible of performance on the last day fixed for no fault of the party required or directed to do the act it will be recognised as properly done, if it is done on the next day it is possible of performance. A suit was compromised on the terms that the "defendant No. 1 will pay to the plaintiff's pleader the amount of R2,250 on the 8th day of October" or on any day before that date or "she will deposit the same in Court and on her paying or depositing the same in the manner aforesaid the plaintiff's claim to the 2 annas share shall be dismissed," and that in default of such payment or deposit "plaintiff's claim to be paid a 2 annas share will be decreed." In the decree drawn up the word "plaintiff" was inserted instead of "to the plaintiff's pleader or into Court." The defendant paid to the plaintiff's pleader R250 before the 8th October and the balance R2,000 was deposited in Court on the 10th of November; the Court was closed from the 8th October to the 9th of November. *Held*, that the Court could not vary the terms of compromise without the parties' consent and the word "plaintiff" in the decree must therefore be held to mean "his pleader or the Court." That the defendant had the option either of paying it to the plaintiff's pleader or of depositing it into Court to the credit of the plaintiff. That the deposit on the 10th of November was valid as the Court was closed between the 8th of October to the 9th of November. SURENDRA NARAYAN MUSTAFI v. SOURAJINI DASI (1906) . . 10 C. W. N. 535

DECREE IN VARIANCE WITH COMPROMISE.

See DEPOSIT . 10 C. W. N. 535

See RIGHT OF SUIT . 10 C. W. N. 1024

DEDICATION.

See BURNING GHAT 10 N. 104

See DEBUTTER . 10 C. W N. 1000

See MAHOMEDAN LAW 10 C. W. N. 449

DEFEASANCE.

See HINDU LAW.
I. L. R. 33 Calc. 1306

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879).

See EVIDENCE ACT.
I. L. R. 30 Bom. 426

——— s. 44—*Pensions Act (XXIII of 1871), s. 4—"Suit"—Execution proceedings—Payment of annuity charged on Saranjám lands—Liability of the son of the grantor to make the payment—Partition of family property—Income of a*

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)—*concluded.*

Saranjám village—Conciliation agreement—Decree.—A conciliation agreement was filed in Court on the 16th June 1882 under s. 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). It effected partition of family property between two brothers, *A* and *N*. Under the agreement *A* undertook to pay to *N* R456-0-6 every year, and for the convenience of the parties this was to come out of the *Saranjám* lands, which had fallen to the share of *A*. The payment was regularly made during the lifetime of *A*, and after his death, *J*, the son of *A*, continued to make the payment till 1899, when he stopped making any more payment. *R*, the son of *N* who had died, then filed a *darkhast* to enforce the payment of 1899-1900. *J* objected to this *darkhast* on two grounds: (1) that a certificate under the Pensions Act (XXIII of 1871) was necessary; and (2) that *A*'s interest having terminated with his death, the *Saranjám* must be considered as a fresh grant to the son, who was not liable to continue the payment. *Held*, (1) that a certificate under the Pensions Act (XXIII of 1871) was not necessary, for the word "suit" in s. 4 of the Act does not include execution proceedings. *Vajiram* v. *Ranchordji I. L. R. 16 Bom. 731*, followed. *Held* (2) that *A* was a trustee in respect of the R456-0-6 for Narayan, the obligation to pay which would attach to the succeeding holders of the *Saranjám* and it followed that *N* and his descendants would have the right to call upon *A* and his descendants to account for their management of the *Saranjám* and pay to them R425-0-6 per annum. A consent decree can only be set aside upon the same grounds as an agreement can be set aside, *e.g.*, fraud or mistake or misrepresentation. *Per* BATTY, *J.*,—"A Court executing a decree cannot question the jurisdiction of the Court, which passed it." "The present application in no way affects property falling within the purview of the Pensions Act, but seeks enforcement against the general assets of the judgment-debtor, whose liability under the decree is not made a charge on the *Saranjám* or cash allowance at all. That liability appears to have been imposed and accepted not as effecting any partition of the *Saranjám* property, but for the purpose of effecting equality in the partition of non-*Saranjám* property, the *Saranjám* property being merely indicated as a fund available to the defendant for the purpose of discharging that liability". TRIMBAKRAO *v.* BALVANTRAO (1905) . **I. L. R. 30 Bom. 101**

DEMOLITION.

See BUILDING . **I. L. R. 33 Calc. 287**

See CALCUTTA MUNICIPAL ACT (BENGAL ACT III OF 1899), s. 449.
I. L. R. 33 Calc. 646

DEMONSTRATIVE LEGACY.

See PROBATE AND ADMINISTRATION ACT (V OF 1881).

DEMURRER.

See CIVIL PROCEDURE CODE.

DEPOSIT OF TITLE DEEDS.

See LIMITATION . **10 C. W. N. 270**

See MORTGAGE.

DEPUTY MAGISTRATE.

See FALSE CHARGE.
I. L. R. 33 Calc. 30

DEVASTHAN COMMITTEE.

———*Powers of appointment and dismissal of Moktesars—Powers exercisable in the interests of the Devasthan—Dismissal of Moktesar—Good and sufficient cause—Burden of proof.*—The powers of appointment and dismissal of Moktesars with which a Devasthan Committee are vested are exercisable not in their own interests, but in the interests and on behalf of the Devasthan, of which they are trustees. They are not at liberty to appoint or dismiss arbitrarily, capriciously or for private reasons of their own, but only on grounds justified by the interests of the institution. When a Moktesar is dismissed by a Devasthan Committee, the burden of proof is on him to show that the Committee did not act in a *bond fide* belief that the dismissal was necessary in the interests of the Devasthan, but had been actuated by some other improper motive. BHAVANISHANKAR *v.* TIMMANNA (1906) . . . **I. L. R. 30 Bom. 508**

DEVIATION.

See BUILDING . **I. L. R. 33 Calc. 287**

DISHONESTY.

See CHEATING . **I. L. R. 33 Calc. 50**

DISMISSAL FOR DEFAULT.

See CIVIL PROCEDURE CODE, s. 102.

DISPOSSESSION BY NATURAL GUARDIAN.

See HINDU LAW.

See LIMITATION ACT, SCH. II, ART. 141.

DISPUTE CONCERNING LAND.

See CRIMINAL PROCEDURE CODE.
I. L. R. 33 Calc. 352

See POSSESSION . **I. L. R. 33 Calc. 68**

DISQUALIFIED PROPRIETOR.

———*Disqualified proprietor, power of, to contract debts and borrow money—Estate under superintendence of Court of Wards—Contract Act (IX of 1872), s. 16—Bond—Unconscionable bargain—Compound interest.*—A talukdar, who has been declared "a disqualified proprietor" under the provisions of the Oudh Land Revenue Act (XVII of 1876) and his estates placed under the management of the Court of Wards is not prohibited by the Act from contracting debts or borrowing money without

DISQUALIFIED PROPRIETOR—*concluded.*

the sanction of the Court of Wards. By the group of sections of the Act (161 to 177) relating to the property when under the superintendence of the Court it was not intended to interfere with the personal estate or rights of an adult disqualified proprietor, who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited. But he cannot without sanction of the Court of Wards create any charge upon the property. *Mohummud Zahoor Ali Khan* v. *Thakooranee Rutta Koer, 11 Moo. I. A. 468,* and *Rai Balkrishna* v. *Masuma Bibi, L. R. 9 I. A. 182; I. L. R. 5 All. 142,* referred to. The defendant, a "disqualified proprietor" whose property on the ground of his indebtedness and consequent inability to manage it, had been placed in charge of the Court of Wards, executed in favour of the plaintiff a bond for R10,000 repayable in seven years on the condition of half-yearly payments of interest at 18 per cent. per annum, and compound interest in default of payment of instalments. The bond was one renewing the former bond in similar terms, on which R8,750 was due, with an additional loan of R1,250. Nothing having been paid in respect of the bond, when it fell due, which was after the defendant's estate was released from the charge of the Court of Wards, the plaintiff sued for the full amount of principal and R31,999 for interest and compound interest due on the bond. *Held,* by the Judicial Committee that, under the circumstances of the case, the plaintiff had been, at the time of the execution of the bonds, in "a position to dominate the will of the defendant" within the meaning of s. 16 of the Contract Act (IX of 1872) as amended by Act VIII of 1899. Both Courts below concurred in finding that simple interest at 18 per cent. per annum would not have been a high rate, but that the charging of compound interest was exorbitant and unconscionable, and accepting these findings, though not strictly findings of fact, the Judicial Committee *held* that the plaintiff used his position to demand and obtain from the defendants more onerous terms than were reasonable, and that the bond should be set aside. In the particular circumstances of the case interest at 18 per cent. per annum was allowed on the sums advanced by the plaintiff throughout. DHANIPAL DAS *v.* MANESHAR BAKHSH SINGH (1906) . . . . I. L. R. 28 All. 570
s.c. L. R. 33 I. A. 118
10 C. W. N. 849

DISTRICT.

See LAND ACQUISITION ACT (I OF 1894).
I. L. R. 33 Calc. 396

DISTRICT JUDGE, POWER OF, TO TRANSFER SUIT.

See CIVIL COURTS ACT, ss. 22, 23.

See CIVIL PROCEDURE CODE, s. 25.

DISTRICT MAGISTRATE, POWER OF.

See FURTHER INQUIRY.
I. L. R. 33 Calc. 8

DISTRICT, MEANING OF.

See CALCUTTA MUNICIPAL ACT, s. 557.

DISTRICT MUNICIPAL ACT.

See BOMBAY DISTRICT MUNICIPAL ACT.

DIVORCE.

——— *Mahomedan Law—Hanafi Sunnis—Talak-ul-bain by one pronouncement in the absence of the wife—Execution of talaknama in the presence of the Kazi—Communication of the divorce to the wife—Marz-ul-maut—Death of the husband before expiration of the period of iddat.* —*A,* a Mahomedan belonging to the Hanafi Sunni sect, took with him two witnesses and went to the Kazi and there pronounced but once the divorce of his wife (plaintiff) in her absence. He had a *talaknama* written out by the Kazi, which was signed by him and attested by the witnesses. *A* then took steps to communicate the divorce and make over the *iddat* money to the plaintiff, but she evaded both. *A* died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of *A* and claimed maintenance and residence. *Held,* overruling the contention that the divorce should have been pronounced three times, that the *talak-ul-bidaat* (*i.e.,* irregular divorce) is good in law, though bad in theology. *Held,* further, in answer to the contention that the divorce was not final as it was never communicated to the plaintiff, that a *bain-talak,* such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing." In order to establish *Marz-ul-maut* there must be present at least three conditions :—(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life: (2) there must be some degree of subjective apprehension of death in the mind of the sick person: (3) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations. Where an irrevocable divorce has been pronounced by a Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat,* she has no claim to inherit to the husband. SARABAI *v.* RABIABAI (1905) . . . . I. L. R. 30 Bom. 537

DOBAS.

See JALKAR . I. L. R. 33 Calc. 15

DOCUMENT.

See CRIMINAL PROCEDURE CODE.

DOCUMENT, ANCIENT.

———Proof—Proper custody.

See EVIDENCE ACT, s. 90.

DOCUMENT 30 YEARS OLD.

See EVIDENCE ACT (I OF 1872), s. 90.
I. L. R. 33 Calc. 571

DOCUMENTARY EVIDENCE.

See EVIDENCE ACT.
I. L. R. 33 Calc. 1345

DONOR, DEATH OF.

——— **Registration of gift.**

See TRANSFER OF PROPERTY ACT, s. 123

DOWER.

See MAHOMEDAN LAW.

DURBHANGA RAJ.

——— **Babuana grant.**

See HINDU LAW.

DWELLING-HOUSE, FATHER'S RIGHT TO EJECT SON FROM.

See HINDU LAW.

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EASEMENT.

See EASEMENTS ACT.

See MADRAS DISTRICT MUNICIPALITIES ACT.

See PRE-EMPTION.
I. L. R. 28 All. 127

See PRESCRIPTION.

——— *Right to cornice acquired by, after 12 years' enjoyment.*—Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he will by prescription acquire a right to the space occupied by such projection and the right to maintain it in its position. A cornice overhanging a neighbour's land cannot be removed by such neighbour, if it has been in existence for more than 12 years. *Mohanlal Jechand* v. *Amrahlal Bechardas, I. L. R. 3 Bom. 174*, referred to and followed. RATHINAVELU MUDALIAR *v.* KOLANDAVELU PILLAI (1906) . . . I. L. R. 29 Mad. 511

EASEMENTS ACT (V OF 1882).

——— **s. 7, ills. (a) and (i)**—*Right of proprietor on higher level under s. 7, ill. (i), not an easement and does not interfere with the right of lower proprietor to build on his own land under s. 7, ill. (a)—District Municipalities Act (Madras Act IV of 1884), ss. 4-B (1) (b), 4-B (3), (b), 21, 261—Supersession of a municipal body under s. 4-B (1) (b) only a suspension—No notice under s. 261 required when the suit is only for injunction.*—The 'supersession' of a Municipal Council under s. *4-B (1) (b)* of Madras Act IV of 1884 is only a suspension of such body for a limited period and such supersession is different from and has not the effect of a dissolution under s. *4-B (1) (a)*. The 'reconstitution' of such a Council under s. *4-B (3) (b)* is the revival of the old corporation and not the creation of a fresh one, and all the rights and liabilities of the superseded Council will devolve on the Council so reconstituted as its rightful successor. The notice required by s. 261 of the District Municipalities Act is not necessary when the suit is for an injunction. The right of the owner of higher land under s. 7, illustration (*i*), of the Easements Act, *i.e.*, that the water naturally rising in, or falling on, such land, shall be allowed by the owner of adjacent lower land to run naturally thereto is not a right in the nature of an easement and is subject to the right of the owner of such lower land to build thereon under s. 7, illustration (*a*), of the Act. The owner of the lower land cannot complain of the passage of such water as an injury, but he is not bound to keep open such way and may obstruct it by suitable erections on his land. *Smith* v. *Kenrick, 7 C. B. 515*, referred to. *Rylands* v. *Fletcher, L. R. 3 H. L. 338*, referred to. MAHAMAHOPADYAYA RANGACHARIAR *v.* MUNICIPAL COUNCIL OF KUMBAKONAM (1906).
I. L. R. 29 Mad. 539

——— **s. 28, cl. (c)**—*Disturbance of easements—Meaning of disturbance—Injunction to prevent disturbance—Light and Air—Physical comfort—Substantial damage.*—The Indian Easements Act is not merely prescriptive; it defines the law relating to easements and thus differs from the English Act in its ambit. S. 28, clause (*c*) of the Act provides that the extent of a prescriptive right to the passage of light and air to a certain window, door, or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used. *Per* CURIAM,—"In any case I see no reason for withholding from 'disturbance' its legal sense of an illegal obstruction, and, for the purpose of Chapter IV, that only can (in my opinion) be an illegal obstruction, for which, if done, a suit would lie. Therefore I hold that for an injunction there must be a threat of something more than mere obstruction and so the plaintiff's first contention fails." To establish that the plaintiffs have suffered substantial damage to their rights to light and air they must show material diminution in the value of their heritage or material interference with their physical comfort. The expression "physical comfort" does not admit of precise definition, but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depends upon the conditions then actually obtaining, regardless of how

EASEMENTS ACT (V OF 1882)—*concluded.*

these conditions came into being or when they may cease, it is a present fact uninfluenced by past history or future fate. Therefore for the purpose of applying the test of the plaintiff's physical comfort, we must look at the state of their property as it is not as it was, or as it may be. FRAMJI SHAPURJI *v.* FRAMJI EDULJI (1905) **I. L. R. 30 Bom. 319**

——— s. 60 (b)—*License—Revocation—Work of permanent character.*—A *kachcha* thatched house may be "a work of a permanent character" within the meaning of s. 60 (*b*) of the Indian Easements Act, 1882, although the thatch of the house is renewed from time to time. *Winter* v. *Brokwell*, 8 *East* 308, referred to. NASIR-UL-ZAMAN KHAN *v.* AZIM-ULLAH (1906) . . **I. L. R. 28 All. 741**

——— *Transfer of non-transferable holding—Ejectment—Abandonment—Sale.*—GHOSE, *C. J.*—Where a tenant of a non-transferable holding sold his holding—*Held*, in a suit by the landlord for recovery of possession from the transferee, that if the transaction of sale was not meant to be an operative one, the title to the property still continued with the tenant. That the true question was whether there was an absolute abandonment of the holding by the tenant such as would entitle the landlord to treat the purchaser as a trespasser. If the defendant was holding possession on behalf of the tenant, he could not be evicted. MATHUR MANDAL *v.* GANGA CHARAN GOPE GHOSE (1906).

10 C. W. N. 1033
s.c. **I. L. R. 33 Calc. 1219**

EJECTMENT.

See AGRA TENANCY ACT (II OF 1901).

See BENGAL TENANCY ACT, s. 50.
10 C. W. N. 930

See CIVIL PROCEDURE CODE.

See HINDU LAW. . **10 C. W. N. 765**

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 339, 459, 531
10 C. W. N. 719

See REGISTRATION.
I. L. R. 33 Calc. 502

See TRANSFER OF NON-TRANSFERABLE HOLDING. **10 C. W. N. 1033**

——— *Dispute between rival vendees—Estoppel—Evidence Act (I of 1872), ss. 115, 116, 117.*—*A*, who had purchased from *X*, brought a suit against *B* for ejectment, alleging that *B* was in wrongful possession of his land. *A* admitted that *X* had sold the same property previously to *B*, but contended that *B* as the mukhtear of *X* had obtained possession fraudulently and by undue influence. *B* alleged that he purchased the property from *X* previously ignorant of the fact that she had no title, and that in reality *P* was the true owner. Subsequently *B* purchased from *P*. *A* contended that, even if *X* had no title, *B*, by reason of having obtained possession

EJECTMENT—*concluded.*

from *X*, was estopped from alleging that *A* had no title. *Held*, that *X* having no title, the conveyance to *A* was invalid, and the rule of estoppel only existed as long as the grantee claimed under the title of the grantor. *Dalton* v. *Fitzgerald*, 1 *Ch.* 440, *S. C on appeal (1897)* 2 *Ch.* 86, distinguished. *Payne* v. *Jones*, 18 *Eq.* 320, referred to. WOODROFFE, *J.*—*X* had no title, and therefore *B* was not estopped from raising that defence, *Dalton* v. *Fitzgerald*, 1 *Ch.* 440, *s. c. on appeal (1897)* 2 *Ch.* 86, distinguished. *Clarke* v. *Adie*, 2 *App. Cas.* 423, *Osterhaut* v. *Shoemaker*, 4 *Barb.* 180, *Averall* v. *Wilson*, 3 *Hill* 513, and *Payne* v. *Jones*, 18 *Eq.* 320, referred to. It is not sufficient for *B* to establish that the sale to *A* was voidable at the option of the vendor: he must show that it was absolutely void. *Lala Achal* v. *Raja Kazim*, *L. R.* 32 *I. A.* 103, referred to. RUP CHAND GHOSH *v.* SARVESWAR CHANDRA CHANDRA (1906).

I. L. R. 33 Calc. 915
s.c. **10 C. W. N. 747**

ENDOWMENT.

See BENGAL REGULATION VIII OF 1819.

See EVIDENCE ACT (I OF 1872), s. 90.
I. L. R. 33 Calc. 571

ENHANCEMENT OF RENT.

See EVIDENCE ACT.

See SECOND APPEAL.
I. L. R. 33 Calc. 200

EQUITABLE MORTGAGE.

See MORTGAGE . . **10 C. W. N. 276**
I. L. R. 33 Calc. 410

EQUITY OF REDEMPTION.

See MORTGAGE.

See TRANSFER OF PROPERTY ACT.

ESCHEAT.

See LETTERS OF ADMINISTRATION.
10 C. W. N. 1085

ESTATES PARTITION ACT (BENGAL ACT VIII OF 1876).

——— s. 116—*Order excluding lands from partition—Suit to direct partition of lands excluded—Limitation Act (XV of 1877), Sch. II, Art. 14.*—Under s. 116 of the Estates Partition Act (Bengal Act VIII of 1876), the Collector can only adopt one of two courses, if any objection is raised before him that a particular plot of land does not appertain to the estate under partition, namely either to strike off the partition or proceed with the partition, treating the disputed land as part of the estate. Where in proceedings under the Estates

ESTATES PARTITION ACT (BENGAL ACT VIII OF 1876)—*concluded.*

Partition Act (Bengal Act VIII of 1876), certain persons objected that certain lands did not appertain to the estate under partition and the Collector passed an order excluding the disputed lands from partition. *Held*, that the order of the Collector was not such an order as he could pass under s. 116 of the Act and was consequently a nullity, and that Art. 14 of Sch. II of the Limitation Act did not apply to it. *Bejoy Chand Mahatab Bahadur* v. *Kristo Mohini Dasi, I. L. R. 21 Calc. 226*; *Shivaji Yesji Chavan* v. *The Collector of Ratnagiri, I. L. R. 11 Bom. 429, Nagu* v. *Yalu, I. L. R. 15 Bom. 424*; *Narendra Lal Khan* v. *Jogi Hari, I. L. R. 32 Calc. 107*, followed. *Parbati Nath Dutt* v. *Rajmohun Dutt, I. L. R. 29 Calc. 369*, distinguished. ALIMUDDIN v. ISHAN CHANDRA DEY (1906).

I. L. R. 33 Calc. 693

ESTOPPEL.

See BENAMI.

See CIVIL PROCEDURE CODE, s. 244 (*c*).

I. L. R. 28 All. 681

See EJECTMENT, SUIT FOR.

See HINDU LAW.

See LIMITATION ACT, s. 19.

I. L. R. 28 All. 315

See PARTIES TO SUIT.

I. L. R. 28 All. 416

See PARTNERSHIP.

See PROBATE.

See REGISTRATION ACT (III OF 1877).

——— *Estoppel by agreement—Grantor and grantee—Possession obtained from a grantor without title—Title subsequently acquired by purchase—Denial of grantor's title—Constructive trust.*—The defendant having obtained possession of some land under a deed of sale from *P.*, who had no title to it afterwards perfected his title by purchase from the real owner. In a suit for recovery of possession of the land brought by the plaintiff, claiming to be a subsequent purchaser from *P.*, on the ground that the previous purchase by the defendant was a fraudulent one. *Held*, that the defendant was not estopped from denying *P.'s* title and setting up his own as purchaser from the real owner. *Per* RAMPINI, *J.*—The estoppel only exists so long as the grantee claims under the title of his grantor alone, *Dalton* v. *Fitzgerald, (1897) 1 Ch. Div. 440*; on appeal *(1897) 2 Ch. Div. 86*, distinguished. *Paine* v. *Jones, L. R. 18 Eq. 320 (1874)*, referred to. *Per* WOODROFFE, *J.*—Ss. 116 and 117 of the Evidence Act are not exhaustive of the doctrine of estoppel by agreement. The ground of the rule of estoppel laid down in *Dalton* v. *Fitzgerald, (1897) 1 Ch. Div. 86*, and similar cases examined. The principle of the rule in such cases is that where property is taken under an instrument and the taking possession is in accordance with a right, which would not

ESTOPPEL—*concluded.*

have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived, there is an estoppel. The ground of the rule of estoppel in the case of bailees, tenants, licensees and acceptors of bills of exchange indicated. RUP CHAND GHOSE v. SARBESSUR CHANDRA CHUNDER. (1906).

10 C. W. N. 747

s.c. I. L. R. 33 Calc. 915

——— *Decree—Execution—Surety guaranteeing payment of judgment-debt—Execution against surety, when proper—Remedy by suit—Civil Procedure Code (Act XIV of 1882), s. 336.*—In the course of the execution of a money decree the judgment-debtor was arrested and brought before the Court. Thereupon the respondents, who were not parties to the proceeding, put in a surety bond covenanting to pay the decretal amount in the event of the judgment-debtor not paying it within a month, and stipulating that, if they failed to pay "the decree-holder would be at liberty to realise the amount by auction sale of their moveable and immoveable properties and by arresting them." The judgment-debtor not having paid the money within a month as stipulated the decree-holder sought to execute the decree against the sureties, who came in and applied for two months' time to pay in the decretal amount and time was allowed. No payment was, however, made and the decree-holder applied for execution and had one of the sureties' properties sold. The sale was subsequently set aside. On a fresh application for execution against the sureties, they objected that no execution could be levied against them and the decree-holder ought to institute a separate suit. *Held*, that although the proper course for the decree-holder in such a case would be to institute a separate suit against the sureties, still having regard to the agreement that was come to and the conduct of the parties in the previous proceedings it ought to be taken that the sureties had waived their right to insist upon a separate suit being brought against them. *Coventry* v. *Tulsi Prasad, 8 C. W. N. 672*, and *Sadasiva Pillai* v. *Ramalinga, L. R. 2 I. A. 219*, relied on. KAZIMUDDI PATARI v. FAUZDAR KHAN (1906) **10 C. W. N. 830**

ESTOPPEL BY CONDUCT.

See HINDU LAW.

EVIDENCE.

See ACT II OF 1899, SCH. I, ART. 1.

I. L. R. 28 All. 436

See CRIMINAL PROCEDURE CODE.

I. L. R. 28 All. 663

See HINDU LAW—PARTITION.

10 C. W. N. 338

See LEGAL PRACTITIONERS' ACT.

10 C. W. N. 57

See MAHOMEDAN LAW **10 C. W. N. 449**

EVIDENCE—*concluded.*

See SECOND APPEAL.

See WAJIB-UL-ARZ . 10 C. W. N. 730

See WILL . . 10 C. W. N. 521

——— *Consideration and weight of evidence—Alleged substitution of one boy for another in infancy—One-sided enquiries made to support allegation—Evidence not judicially taken and without notice to interested parties.*—The question in issue was whether the appellant, defendant in the suit, was entitled to the name he bore and to the property in dispute of which he had long been in possession, or whether, as maintained by the respondent, the plaintiff in the suit, the real heir to the property died in infancy, and the appellant, when a boy, was fraudulently substituted for him. The first Court found in favour of the appellant, but the High Court reversed that decision mainly on evidence taken on enquiries made under official orders, the effect of which was to place the services of the officials employed at the disposal of the pleader for the respondent in order to enable him to obtain material in support of his case. *Held*, by the Judicial Committee that, even if admissible the evidence so taken was of little, if any, value. It was taken to support a foregone conclusion the enquiries were secret: no notice was given to anybody on behalf of the boy, nobody was present throughout the enquiries to represent the boy or protect his interests: there was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise, nobody to test the statements by cross-examination, nobody to watch the accuracy with which they were recorded. Considering the purpose, the nature and the circumstances of the enquiries, which, if they were official in any sense, were certainly not judicial, no weight could be given to the proceedings at or the results of, those enquiries. The judgment of the High Court was therefore reversed. CHANDRASANGJI *v.* MOHANSANGJI (1906).

I. L. R. 30 Bom. 523

——— *Tender of documentary evidence after closing case—Judicial discretion, exercise of—Practice.*—The plaintiff tendered in evidence a Persian judgment of 1886, which was filed with the plaint, after he had closed his case, but before the defendant commenced his, and prayed that the document might be translated and admitted in evidence. The Court of first instance refused this application as "too late". *Held*, that the Court did not exercise a sound judicial discretion in refusing to receive this document in evidence. BARODA PRASAD CHATTERJEE *v.* MADHAB CHANDRA GHOSE (1906) . . . I. L. R. 33 Calc. 1345

EVIDENCE ACT (I OF 1872).

See CRIMINAL PROCEDURE CODE.

——— s. 35.

See WAJIB-UL-ARZ . 10 C. W. N. 730

——— *Management of Hindu temple—Turns of management—Family arrangement—scheme proved by unbroken usage for nineteen years.*—The office of manager of a Hindu temple was vested by inheritance in eight male descendants of the last holder by his two wives, four by each. One member of each branch held office for one year in alternate succession until 1881-2, when the four members of the junior branch including the appellant, relinquished their claim in favour of the respondent, a member of the senior branch. In a suit by the respondent against the appellant in effect to assert his term of office under this family arrangement: *Held*, that an unbroken usage for nineteen years was, as against the appellant, conclusive evidence thereof. The parties were competent to make it, for it involved no breach of trust, and it must hold good until altered by the Court or superseded by a new arrangement. RAMANATHAN CHETTI *v.* MURUGAPPA CHETTI (1906).

L. R. 33 I. A. 139
s.c. I. L. R. 29 Mad. 283

——— *Onus probandi—Plaintiff to prove that his former admissions were untrue.*—Where the defendant in an action of ejectment denied the plaintiff's title by inheritance and pleaded that although the natural son of the last holder, the plaintiff had been adopted by a third party:—*Held*, that on proof of admissions contained in a deed of gift and a power-of-attorney, to which the plaintiff, but not the defendant, was a party, that the plaintiff had described himself as such adopted son, the adoption must be taken to be established in the absence of satisfactory proof by the plaintiff that the admissions were untrue in fact. CHANDRA KUNWAR *v.* CHAUDHRI NARPAT SINGH (1906).

L. R. 34 I. A. 27
s.c. I. L. R. 29 All. 184

——— s. 44—*Suit for rent by administrator—Tenant's plea that letters of administration were obtained by misrepresentation, if entertainable—Fraud—Civil Procedure Code (Act XIV of 1882), ss. 562, 566—Remand.*—Plaintiff having obtained letters of administration to the estate of a deceased landlord sued a tenant for rent. The latter in his written statement objected that the letters of administration had been obtained upon a misrepresentation by the plaintiff as to his relationship with the intestate: *Held*, that assuming that the letters of administration could be regarded as an order within the meaning of s. 44 of the Evidence Act, the allegations of the defendant were not such as would entitle him to go into evidence for the purpose of proving that the letters of administration were invalid in law. That such a defence could not be successfully raised so long as the letters of administration were not revoked by a competent Court. Payment of rent to the plaintiff by the defendant would afford the latter full indemnity against the claim of any other party. *Rajib Panda v. Lakshan Mahapatra, I. L. R. 27 Calc. 11*, and *Pundit Prayag Raj v. Goukaran Pershad Tewari, 6 C. W. N. 787*, distinguished. AMBICA CHURN DAS *v.* KALA CHANDRA DAS (1906).

10 C. W. N. 422

EVIDENCE ACT (I OF 1872)—*continued.*

——— **ss. 85, 114.**

See POWER-OF-ATTORNEY.
I. L. R. 33 Calc. 625

——— **s. 90**—*Document 30 years old—Proper custody—Hindu Law—Endowment—Debutter—Alienation of endowed property—Sebait—Power to grant permanent lease of endowed property—Possession—Landlord and tenant—Possession of lessee under void lease entering into possession and continuing to pay rent—Limitation Act (XV of 1877), Sch. II, Art. 134—Purchaser for value bond fide—Notice—Minerals, right to.*—Where a person, who had obtained possession of a document, which would naturally come into his possession, failed to restore it after his right to possess it had ceased, and the document was produced from his custody. *Held*, that his failure to do so did not make the custody improper within the meaning of s. 90 of the Evidence Act. In determining the question whether a grant is *debutter* the mere use of the word *debutter* is not conclusive. Observation of MUKERJEE, *J.*, in *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, 2 C. L. J. 546*, approved. A permanent *mukarari* lease is an alienation of the proprietary interest *pro tanto*, and if the property is *debutter*, such an alienation by the *sebait* is beyond his legal competence and the possession of the lessee would be adverse to the lessor as from the date of the lease, although the lessee had continued to pay the rent reserved. *Gnansambanda Pandara Samnadhi* v. *Velu Pandaram, I. L. R. 23 Mad. 271: L. R. 27 I. A. 69; Attorney-General* v. *Davey, 4 De G. & J. 136; The President, Magdalen College, Oxford* v. *Attorney-General, 6 H. L. C. 189*, and the observations of Lord Selborne in *President and Governors of Magdalen Hospital* v. *Knotts, 4 App. Cas. 324*, referred to. Where the predecessor in title of the defendants obtained from the *sebait* a permanent lease of the *debutter* property and not merely of any interest, which the *sebait* might have therein. *Held*, that the lessee was a purchaser *pro tanto* within the meaning of Art. 134 of Sch. II of the Limitation Act, and that the fact that he had notice that the property, which he was acquiring, was *debutter* property did not preclude him from being regarded as such, and that a suit to recover the property as against him must be brought within twelve years from the date of the lease. *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, C. L. J. 546; Radha Nath Doss* v. *Gisborne & Co., 15 W. R. P. C. 24; 14 M. I. A. 1*, referred to, *Ram Charan Tewary* v. *Protap Chandra Dutt Jha, 2 C. L. J. 448*, doubted. A permanent lease excluding "all rights of various kinds" with the exception only of the homestead, includes minerals. SHAMA CHARAN NANDI v. ABHIRAM GOSWAMI (1906) . . . **I. L. R. 33 Calc. 511**
s.c. 10 C. W. N. 738

——— **s. 91.**

See ENHANCEMENT.
I. L. R. 33 Calc. 607

EVIDENCE ACT (I OF 1872)—*continued.*

——— *Evidence Act (I of 1872), s. 91—Improvement—Landlord and tenant—Lease, stringent conditions in—Occupancy raiyat—Bengal Tenancy Act (VIII of 1885), s. 29.*—To justify enhancement in contravention of cl. (*b*) of s. 29 of the Bengal Tenancy Act, evidence as regards the improvement effected by the landlord and evidence of the fact that enhancement was agreed to be paid in consideration of such improvement is admissible, and s. 91 of the Evidence Act does not prevent the landlord from giving such evidence, as the consideration for enhancement does not constitute a term of the contract or of the dispossession of the property. A *kabuliat* executed by an occupancy raiyat at an enhanced rate of more than 2 annas in the rupee, although executed in consideration of the avoidance of stringent conditions in a previous lease, is void. *Sheo Sahay Panday* v. *Ram Rachia Roy, I. L. R. 18 Calc. 333*, and *Nath Singh* v. *Damr Singh, I. L. R. 28 Calc. 90*, distinguished. PROBAT CHANDRA GANGAPADHYA v. CHIRAG ALI (1906).
I. L. R. 33 Calc. 607

——— **s. 92.**

See BENAMI . . **10 C. W. N. 570**

——— **s. 92**—*Redemption suit—Sale out-and-out—Construction—Evidence of intention—Admissibility.*—Plaintiffs, who were agriculturists, brought a suit to redeem and the defendant contended that the transaction in suit was a sale out-and-out and not a mortgage. The lower Courts held that the transaction was a mortgage and allowed redemption. *Held*, on second appeal by the defendant, that evidence of intention cannot be given for the purpose merely of construing a document, which purported to be a sale out-and-out and not a mortgage; s. 92 of the Evidence Act (I of 1872), subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from the terms of any contract, grant or other disposition of property the terms of which have been reduced to writing as mentioned in that section. While there are restrictions on the admissibility of oral evidence, s. 92 in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently. ABAJI v. LAXMAN (1906).
I. L. R. 30 Bom. 426

——— *Written document—Absolute conveyance—Mortgage—Contemporaneous oral agreement or statement of intention—Inference from circumstances.*—The plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The plaintiff's contention was based on the grounds that the consideration was a previously

EVIDENCE ACT (I OF 1872)—*continued.*

existing debt and not money paid at the time, that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee and that the consideration was grossly inadequate. The first Court held the transaction to be an out-and-out sale and dismissed the suit. On appeal by the plaintiff, *Held*, confirming the decree, that the meaning of the contention of the plaintiff was that the document was accompanied by a contemporaneous oral agreement or statement of intention, which must be inferred from the said several circumstances relied on, but that in questions of this kind Courts in India must be guided by s. 92 of the Evidence Act (I of 1872), and cannot have recourse to those equitable principles, which enable the Court of Chancery to give relief in those cases of which *Alderson* v. *White (1858), 2 De G. and J. 98*, or *Lincoln* v. *Wright (1859), 4 De G. and J. 16*, furnish examples. This, however, would not have precluded the plaintiff from relying on the provisos to the section, had any of them been applicable. DATTOO *v.* RAMCHANDRA (1905) . . . . I. L. R. 30 Bom. 119

——— ss. 92, 99—*Suit for recovery of haq-i-chaharum—Sale alleged to be disguised as a usufructuary mortgage—Admissibility of evidence.*—The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. *Held*, that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale. *Rahiman* v. *Elahi Bakhsh, I. L. R. 28 Calc. 70*, dissented from; *Jagat Mohini Dasi* v. *Rakhal Das Bisazi, 2 C. L. J. 338*, and *Pathammal* v. *Syed Kalai Ravuthar, I. L. R. 27 Mad. 329*, followed. BAGESHRI DAYAL *v.* PANCHO. (1906) . . . . I. L. R. 28 All. 473

——— ss. 107, 108.

See PRESUMPTION OF DEATH.
I. L. R. 33 Calc. 173

——— s. 108—*Mahomedan Law—Missing heir—Proof of existence—Arbitrator's award—Burden of proof.*—A Mahomedan died on the 27th January 1884, leaving a Will which was disputed amongst his heirs. The dispute being ultimately referred to an arbitrator, the latter by his award, dated 21st February 1888, divided the estate amongst the "heirs and legatees" of the testator amongst whom he included his son *A*, who according to the concurrent findings of the Courts in Burma had not been heard of since 1870. In the present suit the only son of *A* claimed a share in the estate in right of his father under the arbitrator's award. The Courts in Burma dismissed the suit holding that the plaintiff had failed to discharge the burden, which under s. 108 of the Evidence Act lay on him to establish

EVIDENCE ACT (I OF 1872)—*concluded.*

that his father had survived his own father. It was now argued before the Judicial Committee that in arriving at this conclusion the Courts in Burma had failed to give proper effect to the circumstances of the reference to the arbitrator and to the terms of his award. The agreement of reference was not produced and there was nothing to show that *A* was a party to it. Moreover, the arbitrator was not examined as a witness: *Held*, that the proceedings in arbitration were of no value in proving the plaintiff's case, the reserving of a share for *A*, by the arbitrator being explicable on the ground that according to Mahomedan law a share ought to be reserved for a missing heir. MOOLLA CASSIM BIN MOOLLA AHMED *v.* MOOLLA ABDUL RAHIM (1905).
10 C. W. N. 33
s.c. I. L. R. 33 Calc. 173

——— s. 114, ill. (c).

See REVENUE SALE LAW, s. 33.
10 C. W. N. 137

——— s. 115.

See PARTNERSHIP . 10 C. W. N. 313

——— ss. 115, 116, 117.

See EJECTMENT, SUIT FOR.
I. L. R. 33 Calc. 947

——— ss. 145, 161.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 162, 172.
I. L. R. 33 Calc. 1023

EXECUTION.

See EXECUTION OF DECREE.

EXECUTION OF DECREE.

See ATTACHMENT BEFORE JUDGMENT.
I. L. R. 33 Calc. 639

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 244, 546, 583.
I. L. R. 33 Calc. 857, 927
10 C. W. N. 634, 639

See DECREE . I. L. R. 33 Calc. 306

See EXECUTION OF DECREE.

See LIMITATION.
I. L. R. 30 Bom. 115
10 C. W. N. 854

See LIMITATION ACT, SCH. II, ARTS. 179, 209, 303 . I. L. R. 28 All. 249, 651

See MESNE PROFITS.
I. L. R. 33 Calc. 329

See MORTGAGE . I. L. R. 33 Calc. 689

EXECUTION OF DECREE—*continued.*

See PENSIONS ACT.
I. L. R. 30 Bom. 101

See POSSESSION.
I. L. R. 33 Calc. 437

See SECOND APPEAL.
I. L. R. 30 Bom. 113

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 88, 89.
I. L. R. 28 All. 19, 193, 660, 674

——— *Execution of decrees—Absolute and conditional decrees—Notice—Ex parte orders, inherent power of Court to set aside—Application to set aside ex parte order for execution of conditional decree—Limitation.*—The Court has an inherent power to deal with an application to set aside an order made *ex parte* on a proper case being substantiated. *Bibee Tulsiman* v. *Harihar Mahato*, *9 C. W. N. 81*, followed. When a conditional decree is made the plaintiff on the default of the defendant should apply to the Court, which passed the decree, on notice to the defendant by motion on notice or by rule for an order absolute. Then, if and when such an order is obtained, application may be made in the usual way for execution of the order according to the provisions of the Civil Procedure Code. On the plaintiff applying on notice for such order, the Court will determine the question, if necessary, directing the issue to be tried in evidence, whether there has been default of the condition or not. If the Court finds that there has been such default then the plaintiff will be entitled to an order absolute and should thereafter apply to execute that order. The plaintiff obtained a conditional decree on the 21st of June 1905, which provided that she would be entitled to eject the defendant from her premises, unless the latter performed certain conditions. Disputes arose between the plaintiff and the defendant *re* the performance of the conditions and the plaintiff on the 31st of August 1905, without notice to the defendant, applied for and obtained an order for ejectment of the defendant. The defendant was ejected on the 25th September 1905. The defendant applied and obtained a rule on the 1st of December 1905 for setting aside, modifying or reviewing the order of 31st of August. *Held*, that the defendant's application was not barred by limitation. SUDEVI DEVI v. SOVARAM AGARWALLA (1906) . . . . . 10 C. W. N. 306

——— *Dismissal of execution case—Fresh attachment—Sale proclamation.*—It cannot be laid down as a general proposition of law that, because an execution case has been dismissed by reason of no steps having been taken by the decree-holder to bring, within a certain time limited, the property to sale, the attachment already put upon it necessarily falls through. The question is one of intention. *Held*, having regard to the scope of the order dismissing the previous application, that no fresh attachment is necessary before issuing a sale proclamation. GOBINDA CHANDRA PAL v. DWARKA NATH PAL AND OTHERS (1906).
I. L. R. 33 Calc. 666

EXECUTION OF DECREE—*concluded.*

——— *Practice—Procedure—Decree upon a compromise for execution of a conveyance—Execution of decree—Specific performance.*—Where a decree based upon a compromise directed that one party should execute a *kobala* in favour of another within a certain time after the date of the decree: *Held*, that the proper course for the parties would be to proceed regularly as if a decree for specific performance was made. The procedure in such a case laid down. HARE KRISHNA SAMANTA v. PRIYA NATH KHAMROI (1905) . 10 C. W. N. 345

——— *Application for attachment of debts said to be due to judgment-debtor—Denial of debts by alleged debtors—Procedure.*—Where a Court is asked in execution of a decree to attach debts alleged by the decree-holder to be due by third persons to the judgment-debtor, it is no business of the Court to determine in the first instance whether the debts are really due or not, or to refuse execution, if the parties alleged to be debtors to the judgment-debtor deny that they are so. But after attachment the Court may either sell the debts after giving notice to the intending purchasers that the existence of some of them is denied by the alleged debtors, or may appoint a receiver to realize the debts by bringing suits against the debtors. MAHARAJA OF BENARES v. PATRAJ KUNWAR (1905).
I. L. R. 28 All. 262

——— *Limitation Act (XV of 1877), Sch. II, Art. 179—Decree granting an injunction—Civil Procedure Code, s. 260.*—Article 179 of the second schedule to the Limitation Act, 1877, does not apply to an application asking the Court to enforce a decree granting an injunction to abstain from some particular act. All that the Court has to see is whether the party bound by the decree has had an opportunity of obeying the decree or injunction, and has wilfully failed to obey it. *Ram Saran* v. *Chhatar Singh*, *I. L. R. 23 All. 465*, followed. BHAGWAN DAS v. SUKHDEI (1905).
I. L. R. 28 All. 300

——— *Procedure—Postponement of sale by Assistant Collector—Power of Assistant Collector to cancel his own order of postponement—Clerical error—Irregularity.*—An application, purporting to be made by a decree-holder, was presented to an Assistant Collector on the day fixed by the latter for the sale of certain immoveable property. The applicant stated that the decretal money had been paid and asked for the postponement of the sale. The Assistant Collector thereupon granted the application and struck off the execution proceedings, but discovering his error immediately afterwards, cancelled his order and held the auction a few hours later. *Held*, that the Assistant Collector could cancel his original order and that the subsequent sale was not thereby rendered illegal. *Syed Tuffazal Hossein Khan* v. *Raghu Nath Prasad*, *7 B. L. R. 186*, referred to. WAZIR ALI v. JANKI PRASAD (1906) . . . . . I. L. R. 28 All. 671

EXECUTOR.

See CIVIL PROCEDURE CODE.

See HINDU LAW . 10 C. W. N. 566

See LIMITATION ACT . 10 C. W. N. 874

See PROBATE AND ADMINISTRATION ACT, S. 3 . . . 10 C. W. N. 232

See WILL . . . 10 C. W. N. 662

EXECUTOR DE SON TORT.

See ADMINISTRATOR GENERAL'S ACT.

EXECUTOR OF MAHOMEDAN WILL.

See PROBATE . I. L. R. 33 Calc. 116

EXECUTORS.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SS. 7, 53.
I. L. R. 33 Calc. 657

——— *Act V of 1881, s. 92—Execution of decree—One of several joint decree-holders not competent to give a discharge for the full amount of the decree—Executors.—Held,* that one out of several joint decree-holders is not competent to give a valid discharge for the amount of the joint decree, and his position in this respect is not affected by the fact that he and his fellow-decree-holders are co-executors. *Tamman Singh* v. *Lachmin Kunwari, I. L. R. 26 All. 318,* and *Moti Ram* v. *Hanna Prasad, I. L. R. 26 All. 334,* followed. LACHMAN DAS v. CHATURBHUJ DAS (1905).
I. L. R. 28 All. 252

EXECUTORY CONTRACT.

See ASSIGNMENT . 10 C. W. N. 755

EXTRADITION ACT (XV OF 1903).

——— ss. 7 and 8—*Power of Magistrate to hold to bail the person arrested to appear before a tribunal in a Foreign State.*—There is no provision in the Criminal Procedure Code (Act V of 1898) or in the Extradition Act (XV of 1903) authorizing a Magistrate to hold a person to bail to appear before a tribunal in a State, to which the Extradition Act applies, unless the warrant is endorsed under the provisions of s. 8 of the Act. BALTHASAR v. EMPEROR (1906) . . I. L. R. 33 Calc. 1032

F

FALSE CHARGE.

See COMPLAINT . I. L. R. 33 Calc. 1

See CRIMINAL PROCEDURE CODE.

——— *Police—Deputy Magistrate—Order by the District Magistrate sanctioning a prosecution—Legality of order—Offence not brought to his notice in the course of a judicial proceeding—Criminal Procedure Code (Act V of 1898), s. 476*—Where the petitioner laid a charge of mischief by fire at the thana, which was reported to be false, and the District Magistrate, upon the receipt of a report to the same effect from a Deputy Magistrate, to whom he had sent the matter for a judicial inquiry, passed the final order in the police report in these terms—"Enter false, s. 436, Penal Code. Prosecution under s. 211, Penal Code, sanctioned. To Babu M. N. Mukerjee for trial"—*Held,* that the order of the District Magistrate was made under s. 476 and not under s. 195 of the Criminal Procedure Code, and was bad as the matter of the false charge had not come before him in the course of a judicial proceeding. *Semble,* that, if the District Magistrate had made an inquiry into the truth or falsity of the charge, he might have had powe under s. 476 of the Code: or the Deputy Magistrate, who held the inquiry, might have ordered the prosecution of the petitioner. HAIBAT KHAN v. EMPEROR (1905).
I. L. R. 33 Calc. 30

FALSE EVIDENCE.

See CRIMINAL PROCEDURE CODE.

FAMILY CUSTOM.

See HINDU LAW . 10 C. W. N. 825

See PRACTICE . . 10 C. W. N. 230

FISHERY.

See JALKAR . I. L. R. 33 Calc. 15

See JOINDER OF CAUSES OF ACTION.
I. L. R. 33 Calc. 601

See PENAL CODE.

——— *Jalkar—Non-tidal and non-navigable river—Gradual encroachment upon neighbouring estate—Right of fishery over portion encroaching—Regulation XI of 1825, s. 4, cl. 5.*—Where a non-tidal and non-navigable river, which formerly flowed through *A*'s estate, by gradual and imperceptible encroachment came to submerge a portion of an adjoining estate owned by *B*. *Held,* that *A* did not thereby acquire the right of fishery over that portion of the river, which covered *B*'s estate. *Foster* v. *Wright, L. R. 4 C. P. D. 438.* explained. *Lopez* v. *Muddan Mohan Thakur, 13 M. I. A. 467,* relied on. NARENDRA CHANDRA LAHIRI v. SURESH CHANDRA LAHIRI (1906).
10 C. W. N. 540

——— *Jalkar rights—Grant by Government, presumption of—Right of fishery by prescription—Fishing in navigable river.*—Though there may not be any express grant a right of fishery in a navigable river running through land permanently settled with the plaintiffs may still be presumed in their favour, as included in the settlement, from a long continued user of such right *Hari Dass Mal* v. *Mahomed Jaki, I. L. R. 11 Calc. 434,* referred to. SARAT CHANDRA ROY v. KALARAM MALO (1906) . . . I. L. R. 33 Calc. 1349

FORECLOSURE.

See MORTGAGE . 10 C. W. N. 778

FOREIGN JURISDICTION AND EXTRADITION ACT.

See NATIVE STATES . 10 C. W. N. 361

FORFEITURE.

——— *Land Revenue Code (Bombay Act V of 1879), ss. 56, 57, 153—Arrears of assessment—Forfeiture by Government—Mortgage—Land in possession of the occupant—Re-grant by Government to the occupant—Suit by mortgagee to recover possession—Equities arising out of the conduct of the parties.*—Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation. When arrears of assessment are levied by sale, then s. 56 of the Land Revenue Code (Bombay Act V of 1879) in pursuance of an obvious policy, empowers the Collector to sell "freed from all tenures, incumbrances and rights created by the occupant .....or any of his predecessors-in-title or in anywise subsisting against such occupants." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and the subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties. *Balkrishna Vasudev* v. *Madhavrav Narayan, I. L. R. 5 Bom. 73*, followed. AMOLAK BANECHAND *v.* DHONDI (1906).
I. L. R. 30 Bom. 466

FORGERY.

See PENAL CODE.

FORMÂ PAUPERIS.

See CIVIL PROCEDURE CODE.
10 C. W. N. 857

FRAUD.

See ADMINISTRATION BOND.
10 C. W. N. 673
I. L. R. 33 Calc. 713

See ASSIGNMENT . 10 C. W. N. 755

See CIVIL PROCEDURE CODE.
10 C. W. N. 286

See CONTRACT . I. L. R. 33 Calc. 547

See EVIDENCE.

See EVIDENCE ACT.
10 C. W. N. 422

See HINDU LAW—MAINTENANCE.
10 C. W. N. 1074

See LIMITATION.

See PROBATE . I. L. R. 33 Calc. 1001

See RES JUDICATA.
I. L. R. 30 Bom. 35

FRAUD—*concluded.*

——— *Judgment obtained by perjury may be set aside on the ground of fraud.*—A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence. The law on this point is the same in India as in England. VENKATAPPA NAICK *v.* SUBBA NAICK (1905) . I. L. R. 29 Mad. 179

FRAUDULENT TRANSFER.

See BENAMI . . . 10 C. W. N. 650

See BENAMI DEEDS I. L. R. 33 Calc. 967

See CRIMINAL PROCEDURE CODE.

FURTHER INQUIRY.

See CRIMINAL PROCEDURE CODE.

——— *Security for good behaviour—District Magistrate, power of.*—A District Magistrate has no power under the law to order a 'further' inquiry in a proceeding under s. 110 of the Code of Criminal Procedure after setting aside, on appeal, an order passed by a Subordinate Magistrate directing the accused to furnish security for good behaviour. DAYANATH TALUQDAR *v.* EMPEROR (1905).
I. L. R. 33 Calc. 8

G

GAMBLING.

——— *Bombay Prevention of Gambling Act (Bombay Act IV of 1887), s. 12—Gambling in a railway carriage—Through special train—Public place—Railway track—Public having no right of access except passengers.*—The accused were convicted under s. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) as persons found playing for money in a railway carriage forming part of a through special train running between Poona and Bombay, while the train stopped for engine purposes only at the Reversing Station (on the Bore Ghauts between Karjat and Khandala Stations) of the Great Indian Peninsula Railway. *Held*, reversing the conviction, that a railway carriage forming part of a through special train is not a public place under s. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). *Per* JENKINS, *C. J.*—The word "*place*" [in s. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887)] is, I think, qualified by the word "public" and having regard to its context and its position in that context, it must, in my opinion, mean a *place* of the same general character as a *road* or *thoroughfare* . . . I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to a street or thoronghfare as to justify us in holding that it was a public place within the meaning of s. 12 of the Act, with which alone we are concerned. *Per* RUSSEL, *J.*—The adjective "public" [in s. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887)] applies

GAMBLING—*concluded.*

to all the three nouns—street, place or thoroughfare, and it is clear that the railway line certainly cannot be described as a "public street or thoroughfare," inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and "thoroughfares." EMPEROR v. HUSSEIN (1905) . . I. L. R. 30 Bom. 348

GAMBLING ACT (BENGAL ACT II OF 1867).

——— ss. 4, 5 and 6—*Common gaming house—Evidence—"Credible information."—Held,* that when a house is searched by the Police on information that it is a common gaming house, the finding of instruments of gaming will be admissible evidence that the house is used as a common gaming house notwithstanding that the warrant, under which the search is conducted, is defective, though the finding of such articles may not be evidence to the extent mentioned in s. 6 of Bengal Act II of 1867. *Held,* also, that the words "credible information" as used in s. 5 of Act II of 1867, have not the same meaning as "credible evidence." The "credible information" there mentioned need not be in writing. EMPEROR v. ABDUS SAMAD (1905) . I. L. R. 28 All. 210

GENERAL POWER OF ATTORNEY.

See CIVIL PROCEDURE CODE.

GHAT.

See BURNING GHAT.

GHATWALI TENURES.

See RIGHT OF OCCUPANCY.
I. L. R. 33 Calc. 630

GIFT.

See BENAMI . . 10 C. W. N. 570

See HINDU LAW.
I. L. R. 33 Calc. 23, 947
16 C. W. N. 1

See MAHOMEDAN LAW.
10 C. W. N. 707

See SUCCESSION ACT.
I. L. R. 30 Bom. 500

See TRANSFER OF PROPERTY ACT.
10 C. W. N. 717

See UNDUE INFLUENCE.
I. L. R. 33 Calc. 773

——— *Law of Native State—Law in British India—Difference—Burden of proof—Trustee—Cestui que trust—Confidential relation.*—It lies on him, who asserts it, to prove that the law of the Native State differs from the law in British India, and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature. Persons standing in a confidential relation

GIFT—*concluded.*

towards others cannot entitle themselves to hold benefits, which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the person, by whom the benefits have been conferred, had competent and independent advice in conferring them. This applies to the case of a trustee and *cestui que trust. Vaughton* v. *Noble, 30 Beav. 34 at page 39,* and *Liles* v. *Terry, 2 Q. B. 679 at page 686,* followed. RAGHUNATH v. VARJIVANDAS (1906) . I. L. R. 30 Bom. 578

——— *Registration—Deed of gift of immoveable property after death of the donor—Representative of deceased donor—Transfer of Property Act (IV of 1882), ss. 4, 123—Registration Act (III of 1877), s. 35.*—Where the widow of a deceased person, who had executed a deed of gift, was his representative, she would be his representative within the meaning of s. 25 of the Registration Act, although she was also the donee under the deed, and would be qualified to admit the execution and so to render the registration of the deed proper and effectual. *Pakran* v. *Kunhammed, I. L. R. 23 Mad. 580,* referred to. S. 123 of the Transfer of Property Act is, by virtue of s. 4 of the Act, to be read as supplemental to the Indian Registration Act, and the expression "registered instrument," in s. 123 means an instrument registered in accordance with the provisions of the Indian Registration Act, and not necessarily one registered by the donor himself. *Nand Kishore Lal* v. *Suraj Prasad, I. L. R. 20 All. 392,* approved. Where a Hindu executed a deed of gift in favour of his wife and it was registered after his death on her admission, she being his representative. *Held,* that the deed was a registered instrument within the meaning of s. 123 of the Transfer of Property Act. BHABATOSH BANERJEE v. SOLEMAN (1906).
I. L. R. 33 Calc. 584
s. c. 10 C. W. N. 717

GOODS.

See CONTRACT . I. L. R. 33 Calc. 547

GRANT.

See CANTONMENT PROPERTY.
I. L. R. 30 Bom. 137

See CHOTA NAGPUR ENCUMBERED ESTATES ACT . 10 C. W. N. 149

See ESTOPPEL . 10 C. W. N. 747

See FISHERY, RIGHT OF.
I. L. R. 33 Calc. 1349

See HINDU LAW . 10 C. W. N. 95

See LANDLORD AND TENANT.
10 C. W. N. 17, 425

——— *Land acquired for a public purpose—Collector's award of compensation—Dispute between rival claimants—Elements of a good dedication made to the public—Exclusive and continuous user by the public with owner's knowledge—Burning ghat—Meaning of term 'ghat'—Bengal Municipal Act (Bengal Act III*

GRANT—*continued.*

of 1884), ss. 30, 87, 98, 254, 256, 347, 348.—An exclusive and continuous user by the public with the owner's knowledge and acquiescence for the prescription period will raise the presumption of a grant or dedication to the public. *Bessemer* v. *Jenkins, 56 Am. Sp. Rep. 26; Kennedy* v. *Cumberland, 57 Am. Rep. 346,* and *Boyce* v. *Kalbaugh, 28 Am. Rep. 464,* referred to. Where a dedication is implied only, the question may arise whether the dedication was of the entire ownership of the land or merely of the right of user. *Grogan* v. *Hayward, 4 Fed. Rep. 161, Bushnell* v. *Scott, 94 Am. Dec. 555,* referred to. To constitute a valid dedication it is not essential that the legal title should pass from the owner. *New Orleans* v. *United States, 10 Peters 662, 712,* referred to. It is not consistent with an effectual dedication that the owner should continue to make any and all uses of the land, which do not interfere with the uses for which it is dedicated. *State* v. *Trask, 27 Am. Dec. 554, the Vestry of St. Mary Newington* v. *Jacobs, L. R. 7 R. B. 47, Jaggamoni Dasi* v. *Nilmoni Ghosal, I. L. R. 9 Calc. 75,* referred to. One of the essential elements of a good dedication is that it is made to the public, that it be irrevocable, and the land be for ever dedicated for the designated public use. *Dawes* v. *Hawkins, 8 C. B. N. S. 848, San Francisco* v. *Canavan, 42 Calif. 541,* referred to. Land dedicated for cemeteries, if subsequently abandoned, will revert to the dedicator or his heirs. *Campbell* v. *City of Kansas, 10 L. R. A. 593, New Ark* v. *Watson, 94 L. R. A. 843, Board of Commissioners* v. *Young, 8 C. C. A. 27: L. C. 59 Fed. Rep. 96, Board of Education* v. *Edson, 98 Am. Dec. 114, Quinn* v. *Leathem, App. Cas. 495, 506,* referred to. *Manmatha Nath Mitter* v. *Secretary of State for India in Council, I. L. R. 25 Calc. 194: s.c. L. R. 24 I. A. 177,* distinguished. The following English cases are authorities on the question of the principle of valuation of land subject to restrictions to use. *Hilcoat* v. *Archbishop of Canterbury, 10 C. B. 327, Stebbing* v. *Metropolitan Board of Works, L. R. 6 Q. B. 37, City and South Railway Co.* v. *St. Mary Woolnoth, 18 T. L. R. 612: s.c. 19 T. L. R. 363.* The following English cases were referred to where the question raised was as to the principle upon which compensation, when awarded for land, subject to restriction as to use, had to be apportioned amongst persons interested in the property. *Campbell* v. *Mayor and Corporation of Liverpool, L. R. 9 Eq. 579, Ex parte Rector of Liverpool, L. R. 11 Eq. 15,* and *Ex parte Rector of St. Martin's, Birmingham, L. R. 11 Eq. 23.* Under s. 30 of the Bengal Municipal Act the term 'ghat' does not include a burning ground. *Chairman of the Naihaty Municipality* v. *Kishory Lal Goswami, I. L. R. 13 Calc. 171, Modhu Sudan Kundu* v. *Promoda Nath Roy, I. L. R. 20 Calc. 782,* referred to. CHAIRMAN OF THE HOWRAH MUNICIPALITY *v.* KHETRA KRISHNA MITTER (1906). **I. L. R. 33 Calc. 1290 s.c. 10 C. W. N. 1044**

——— *Grant, Construction of—Mention of a person as heir of grantee confers no interest on such person.*—Where a deed of grant to a widow recites that she has no other heirs than her daughter, and that the lands shall belong to such daughter at her death, the grant is not to be construed as a grant to the widow and her daughter. The grant is absolute and to the widow alone, the daughter taking no interest under it. RENGASAMY NAIKEN *v.* GANGAMMAL (1905) . **I. L. R. 29 Mad. 300**

GRANTOR.

See ESTOPPEL.

GUARDIAN AND MINOR.

See CIVIL PROCEDURE CODE.

See HINDU LAW . . **10 C. W. N. 1**

——— *Contract for sale by guardian of minor—Subsequent sale to third party—Sanction of District Judge—Sale, void or voidable—Specific performance.*—A certificated guardian of certain minors contracted to sell their property to the plaintiff for a consideration of R217, of which R30 was to be paid in cash and the balance of R187 was to redeem a mortgage upon the property executed by the late father of the minors in favour of the plaintiff. The guardian undertook to obtain the sanction of the District Judge to the transaction. She afterwards fraudulently conveyed the property by registered deed to her relative the defendant No. 1, who was fully aware of the previous contract with the plaintiff. *Held,* that the sale to the plaintiff was not *ipso facto* void, but only voidable at the instance of any person affected thereby. That the plaintiff became entitled to obtain specific performance when, by finding that the sale to him was for the minors' benefit, the District Judge in effect sanctioned the sale. ETWARIA *v.* CHANDRA NATH MUKHERJEE (1905) . **10 C. W. N. 763**

——— *Guardian and minor—Arbitration—Authority of guardian to agree to a reference to arbitration on behalf of a minor.—Semble* that s. 462 of the Code of Civil Procedure does not apply to proceedings under Chapter XXXVII of the Code. A minor party therefore will be bound by the consent of his guardian to refer the matters in dispute to arbitration, if there is no fraud or gross negligence, although the Court has not under the provisions of s. 462 sanctioned the agreement to refer. *Sheo Nath Saran* v. *Sukh Lal Singh, I. L. R. 27 Calc. 229,* and *Chengal Reddi* v. *Venkata Reddi, I. L. R. 13 Mad. 483,* followed. HARDEO SAHAI *v.* GAURI SHANKER (1905) . **I. L. R. 28 All. 35**

GUARDIAN AD LITEM.

See CIVIL PROCEDURE CODE.

——— *Guardian ad litem—Procedure—Appointment of guardian ad litem invalid—Effect of invalidity on decree passed against minor defendant.*—The provisions of s. 443 of the Code of Civil Procedure as to the appointment of a guardian

GUARDIAN AD LITEM—*concluded.*

ad litem for a minor defendant are imperative and where those provisions are not substantially complied with, the minor is not properly represented, and any decree, which may be passed against him, is a nullity. *Khirajmal* v. *Daim, L. R. 32 I. A. 26,* followed. *Walian* v. *Banke Behari Prasad Singh, I. L. R. 30 Calc. 1021,* distinguished. HANUMAN PRASAD v. MUHAMMAD ISHAQ (1905).

I. L. R. 28 All. 137

——— *Investment by guardians of minor's property—Principles governing investment by guardians—Indian Trusts Act (II of 1882), s. 20.*—Guardians are in a fiduciary position and the Court should be guided by the rules embodied in the Trusts Act in sanctioning changes in the investment of a minor's property. The duty of guardians is primarily to preserve and not to add to the property of the minor. Where it was sought to invest monies belonging to a minor in the purchase of lands deriving their income from buildings erected thereon. *Held,* that the proposed investment not being one which trustees would be authorised to make, the Court must withhold its sanction. *Learoyd* v. *Whiteley, 12 App. Cas. 727, 739,* followed and applied. IN RE CASSUMALI (1906).

I. L. R. 30 Bom. 531

GUARDIAN AND WARDS ACT (VIII OF 1890).

——— s. 17.

See ACT XXI OF 1850, s. 1.

——— s. 17—*Caste Disabilities Removal Act, s. 1—Hindu Law—Guardian and minor—Right of Hindu mother to be guardian of her infant daughter.*—In the absence of any special reason to the contrary a Hindu mother has a better right to the guardianship of her infant daughter than the infant's paternal grandfather, and this right is not taken away by the fact that the mother has been outcasted. *Kanahi Ram* v. *Biddya Ram, I. L. R. 1 All. 549,* followed KAULESRA v. JORAI KASAUNDHAN (1905) . . . **I. L. R. 28 All. 233**

——— s. 30—*Minors Act (XL of 1858), s. 18—Guardian and minor—Lease by guardian in excess of his powers—Sale of leased property by minor on attaining majority—Suit by purchaser for possession—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 91.*—The certificated guardian of a minor granted, without previously obtaining the permission of the Court, a perpetual lease of certain immoveable property forming part of the minor's estate on the 28th March 1890. The minor came of age on the 7th of December 1901, and on 21st October 1902, sold the property, the subject of the lease mentioned above. On the 22nd of July 1903, the purchaser sued for possession of the property purchased by him, asking for cancellation of the lease, if necessary. *Held,* that it was not necessary for the plaintiff to ask for cancellation of the lease as a condition precedent to his obtaining a decree for possession, and that the suit was not barred by limitation. *Mauji Ram* v. *Tara Singh, I. L. R. 3 All. 852, Girraj Baksh* v. *Kazi Hamid Ali, I. L. R. 9 All. 840, Ramasar Pandey* v. *Raghubar Jati, I. L. R. 5 All. 490,* and *Unni* v. *Kunchi Amma, I. L. R. 14 Mad. 26,* referred to by BANERJI J. ABDUL RAHMAN v. SUKHDAYAL SINGH (1905).

I. L. R. 28 All. 30

GUARDIAN AND WARDS ACT (VIII OF 1890)—*concluded.*

——— ss. 34, 35, 36 and 37—*Minor—Guardian—Administration bond passed to Judge—Refusal of the Judge to assign—Appeal.*—No appeal lies from an order passed by the District Judge under s. 35 of the Guardian and Wards Act (VIII of 1890) declining to assign the bond. A bond under s. 34 of the Guardian and Wards Act (VIII of 1890) is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form, as given in the schedule of the High Court Circular Orders, which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser or otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events. The District Judge can in his discretion under such circumstances assign such a bond to a proper person. GANPAT v. ANNA (1905).

I. L. R. 30 Bom. 164

——— ss. 39 and 52—*Minors—Guardian of person—Guardian of property—Minor having proprietary interest with adults in joint family—Joint family comprising all minors—Guardianship liable to cease as soon as there is an adult person.*—A guardian of the property cannot be appointed for a minor, whose only proprietary interest is as co-parcener with adults in a joint family property. This principle does not apply when all the co-parceners are minors and a guardian of the property is appointed for the whole number. *Lingangowda* v. *Gangabai, P. J. p. 521,* followed. As soon as there is an adult co-parcener, any guardianship of the property previously constituted either ceases or is liable to cease. An order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his power under s. 52 of the Guardian and Wards Act (VIII of 1890). BINDAJI v. MATHURABAI (1905).

I. L. R. 30 Bom. 152

GUJARAT TALUKDARS' ACT (BOMBAY ACT VI OF 1888).

——— ss. 10, 11, 16 and 17—*Talukdari Settlement Officer—Decision—Appeal—Second appeal—Subsequent suit in a Court of competent jurisdiction—Res judicata.*—Certain proceedings

GUJARAT TALUKDARS' ACT (BOMBAY ACT VI OF 1888)—*concluded.*

which had arisen out of an application to the Talukdari Settlement officer under s. 11 of the Gujarat Talukdars' Act (Bombay Act VI of 1888) went up to the High Court in second appeal. Subsequently the same question having arisen between the same parties in a regular suit in a Court of competent jurisdiction. *Held*, that the question was not *res judicata*. A Talukdari Settlement officer is not a Court of jurisdiction competent to try the suit. He is an administrative officer according to the machinery prescribed by the Bombay Legislature. "In considering the competency of a Court for the purpose of deciding on a question of *res judicata*" the Court "must look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal." *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee, I. L. R. 5 Calc. 832, 838*, followed. MALUBHAI *v.* SURSANGJI (1905).

I. L. R. 30 Bom. 220

GURAV SERVICE.

See STRIDHAN. I. L. R. 30 Bom. 229

H

HANAFI SUNNIS.

See MAHOMEDAN LAW.

HEIRS.

See HINDU LAW.

HIGH COURT.

See CIVIL PROCEDURE CODE.

See LETTERS PATENT FOR BOMBAY HIGH COURT, CL. 13 . 10 C. W. N. 185

See LIMITATION ACT, SCH. II, ART. 179. 10 C. W. N. 28

See POSSESSION. I. L. R. 33 Calc. 487

See PRACTICE . I. L. R. 30 Bom. 477

See SMALL CAUSE COURT ACT. I. L. R. 30 Bom. 147

HIGH COURT REVISION *SUO MOTU*.

See CIVIL PROCEDURE CODE. 10 C. W. N. 609

HIGH COURT RULES.

See ADVOCATE GENERAL. I. L. R. 30 Bom. 474

HIGH COURT RULES—*concluded.*

——— *Rule 361—Suit against a firm—Addition of the names of partners constituting the firm—Practice and procedure—Jurisdiction of the Court to entertain suit—Letters Patent, clause 12.*—Rule 361 of the Rules and Forms of the Bombay High Court does not extend the jurisdiction of the Court: it merely sanctions the use of the firm's name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length. SHAW WALLACE & Co. *v.* GORDHANDAS (1905).

I. L. R. 30 Bom. 364

HIGHWAY.

See PORT COMMISSIONERS' ACT (BENGAL ACT V OF 1870), ss. 5, 6, 31, 38, 39. I. L. R. 33 Calc. 1243

HINDU FAMILY.

See HINDU LAW. I, L. R. 33 Calc. 507

HINDU LAW.

1. ADOPTION.
2. ALIENATION.
3. BABUANA GRANT.
4. CHARITABLE TRUSTS.
5. DAMDUPAT.
6. DAYABHAGA.
7. DEBTS.
8. DEBUTTER PROPERTY.
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16. MARRIAGE.
17. MITAKSHARA.
18. PARTITION.
19. REVERSIONARY RIGHT.
20. SEPARATE PROPERTY.
21. SHEBAIT.
22. STRIDHAN.
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HINDU LAW—*continued.*

See PRACTICE I. L. R. 30 Bom. 477
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See SUCCESSION ACT 10 C. W. N. 695
See WAJIB-UL-ARZ . 10 C. W. N. 730

1. ADOPTION.

——— *Adoption—Receipt of consideration by natural father for giving in adoption does not make the adoption invalid.*—Where a boy, being a fit subject for adoption in the Dattaka form, is given and accepted, with the proper ceremonies for such adoption, by persons respectively competent to give and accept him, he acquires the status of an adopted son. The receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment. Such payment has not the effect of converting the adoption into an 'affiliation by sale,' a form now obsolete. *Manjaneer puthiran* is synonymous with Dattaka son. *Bhasba Rabidat Singh* v. *Indar Kunwar, I. L. R. 16 Calc. 556,* followed. MURUGAPPA CHETTI v. NAGAPPA CHETTI (1905) . . I. L. R. 29 Mad. 161

——— *Character of descendibility not affected by forfeiture and regrant to heirs—Adoption—Authority given jointly to two widows to adopt valid and can be exercised by one after the death of the other—Adoption made under coercion only voidable—Adoption does not divest an adopted son of joint property, of which he had become sole and absolute owner.*—The question whether an estate is subject to the ordinary Hindu Law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga, L. R. 17 I. A. 134 at p. 144,* referred to and followed. Where an estate acquired by sale or forfeiture by Government is regranted to the heirs of the former owner without expressing any intention to interfere with the quality of the estate in regard to its descendibility, such regrant does not affect that quality of the estate, although it would be self-acquired property in the hands of the grantee and would devolve as such: *Held,* on the evidence and the previous history of the Nidadavole estate that such estate was partible according to the ordinary Hindu Law applicable to co-parcenary property. An authority to adopt given to two widows jointly is not invalid and may be exercised by one after the death of the other. An adoption made under coercion is not void, but voidable and will be valid, if ratified subsequently, if no one's interest is prejudicially affected by such ratification before it is made. The adoption into another family of the only surviving member of a joint family, in whom the family

estate has vested solely and absolutely does not, in law, operate to divest him of his rights in such estate. VENKATA NARASIMHA APPA ROW v. RANGAYYA APPA ROW AND OTHERS (1905). I. L. R. 29 Mad. 437

——— *Adoption by widow under husband's authority—Second adoption, validity of—Restrictions to widow's power—Intention—Spiritual benefit how secured—Continuation of line—Law in Madras, Bombay and Bengal.*—A Madras Brahmin died intestate and without issue, leaving his widow authority to adopt. He placed no specific limitation on the power to adopt, his object being to secure spiritual benefit to himself, and to continue his line. The first child adopted by the widow having died when little more than two years of age: *Held,* that the widow's authority to adopt was not exhausted by the first adoption and the adoption of a second boy after the first died was valid. *Gournath Chowdhry* v. *Arnopoorna Chowdrain, S. D. A. for 1852, 332,* adversely commented on and not followed. The main factor for consideration in these cases is the intention of the husband. Any special instructions, which he may give for the guidance of his widow, must be strictly followed. Where no such instructions have been given, but a general intention has been expressed to be represented by a son, effect should, if possible, be given to that intention. *The Ramnad case, 12 Moo. I. A. 308 at p. 443,* referred to as indicating limitations to the application of the above rule. *Surendra Nandan* v. *Sailaja Kanta Das Mahapatra, I. L. R. 18 Calc. 385,* and the judgment of MITTER, J., in *Ram Soondur Singh* v. *Surbanee Dassee, 22 W. R. 121,* approved. KANNEPALLI SURYANARAYANA v. PUCHA VENKATARAMANA (1906).
10 C. W. N. 921
s.c. L. R. 33 I. A. 145
I. L. R. 29 Mad. 382

——— *Adoption—Authority to adopt—Power of Hindu widow acting on authority from her husband—Evidence as to giving authority and carrying out its directions.*—All the Schools of Hindu Law recognise the right of the widow to adopt a son to her husband with his assent, which may be given either orally or in writing, and when given must be strictly pursued. The widow cannot be compelled to act upon such authority, unless and until she chooses to do so; and in the absence of express direction to the contrary there is no limit to the time within which she may exercise the power conferred upon her. In this case it was held on the evidence that the authority to adopt a son had been given, and its directions had been strictly pursued, the judgment of the High Court being affirmed. MUTASADDI LAL v. KUNDAN LAL (1905) . . I. L. R. 28 All. 377
s.c. L. R. 33 I. A. 55

——— *Adoption—Custom—Purbia Kurmis.*—*Held,* that the Purbia Kurmis, calling themselves

HINDU LAW—*continued.*

1. ADOPTION—*concluded.*

Purbia Chattris, do not really belong to the regenerate classes and, therefore, the adoption by a member of this caste of the grandson of his father's sister is not invalid as being within the prohibited degrees of relationship. JIWAN LAL *v.* KALLU MAL (1905).
I. L. R. 28 All. 170

——— *Adoption—Consent of sapindas obtained by false representation.—Held,* that a widow who fails to prove her husband's authority to adopt, cannot support its validity by consent given by her husband's sapindas on her representation that by so doing they were ratifying the husband's authority. JONNALAGADDA VENKAMMA *v.* JONNALAGADDA SUBRAHMANIAM (1905).
L. R. 34 I. A. 22
s.c. I. L. R. 30 Mad. 50

2. ALIENATION.

——— *Alienation by Hindu widow—Limitation—Suit by reversioner for possession—Limitation Act (XV of 1877), Arts. 91, 141.*—Where a reversioner sued to recover certain property, which had been alienated by a Hindu widow, the alienation having been made by deeds of sale, on the ground that they were made without legal necessity, *Held,* that as the sale-deeds were not supported by necessity and the reversioner not having elected to assent to them, it was not necessary to set them aside, and the suit was governed by Art. 14, and not by Art. 91 of the Limitation Act. *Bijoy Gopal Mukerji* v. *Nil Ratan Mukerji, I. L. R. 30 Calc. 990, Modhu Sudan Singh* v. *Rooke, I. L. R. 25 Calc. 1,* and *Narmada Debi* v. *Shoshibhusan Bit, 8 C. W. N. 802,* referred to. HARIHAR OJHA *v.* DASARATHI MISRA (1905) . . I. L. R. 33 Calc. 257

3. BABUANA GRANT.

——— *Babuana grant—Alienability—Hindu Law—Mitakshara—Babuana property, if ancestral in the grantee's hand—Interest of co-parcener, attached before death—Claim—Release from attachment—Right of decree-holder to follow property—Civil Procedure Code (Act XIV of 1882), s. 280—Regular suit.*—Property granted as *babuana* in accordance with the *kulachar* of the Durbhanga Raj to junior members of the family for their maintenance is alienable, subject only to the ultimate claim of the grantor as reversioner on the extinction of the grantee's descendants in the male line. *Rameshwar Singh* v. *Jibandar Singh, 9 C. W. N. 567 : s.c. I. L. R. 32 Calc. 683,* followed. Such property is ancestral property in the hands of the grantee, and a son of the grantee acquires an interest in it at his birth. When the undivided property of a joint Mitakshara family was attached in execution of a decree against a co-parcener, the fact that the property was, before the judgment-debtor's death, provisionally released from attachment under s. 280, Civil Procedure Code, does not

HINDU LAW—*continued.*

3. BABUANA GRANT—*concluded.*

prevent the decree-holder from working out his rights acquired by virtue of the attachment, if subsequently to the judgment-debtor's death the order under s. 280, Civil Procedure Code, is set aside in a regular suit. *Suraj Bunsi Koer* v. *Sheo Prosad Singh, L. R. 6 I. A. 88 ; Bonomali Roy* v. *Prosunno Narayan Chowdhry, I. L. R. 23 Calc. 829,* relied on. RAM CHANDRA MARWARI *v.* MUDESHWAR SINGH (1906) . . . . 10 C. W. N. 978
s.c. I. L. R. 33 Calc. 1158

4. CHARITABLE TRUSTS.

——— *Charitable trusts, when colourable—Limitation Act (XV of 1877), Art. 91—Laches—Undue influence, deed executed under—Fiduciary relation, deed between persons standing in—Letters Patent, cl. 36.*—A deed of trust can be held to be nominal only, when no charity or trust is brought into existence, when there is no proof of the application of the alleged endowments for the maintenance thereof, and the whole conduct of the parties is inconsistent with the hypothesis of a genuine trust. *Per* SIR S. SUBRAHMANIA AYYAR, *Offg. C. J.*—The provisions in a trust deed denying to the public any interest in the charities and authorising the change of the trust property are not inconsistent with the creation of a valid trust; and even if they were, they would be only invalid conditions annexed to a valid trust. The doctrine that Courts will regard with jealousy transactions between persons standing in the fiduciary relation of parent and child will not apply when no advantage is secured to the former at the expense of the latter, and where the properties are already impressed with the trust, the appointment of the father as sole trustee is no such advantage as such a right exists under the Hindu Law. *Purappavanalingam Chetti* v. *Nullasivan Chetti, 1 M. H. C. 415.* A party, who has not sued within the period prescribed by Art. 91, Sch. II of the Limitation Act, to set aside an instrument on the ground of undue influence cannot be heard in derogation of the rights created by it. *Kanki Kunwar* v. *Ajit Singh, I. L. R. 15 Calc. 58,* followed. One of two executants of a deed cannot, after the death of the other, set up the undue influence exercised by that other to defeat the rights of beneficiaries under the deed, when he had ample opportunities to do so in the lifetime of the other, and when, if he had done so, the other party would have had legal power to carry out his intentions in favour of the beneficiaries by other means. *Per* SANKARAN NAIR, *J.*—The provision that the public shall have no interest in the trust converts it into a private trust, if any trust is created, which can be put an end to at any time; and the right to change the properties and to exclude or withdraw them as conferred by the deed implies a power not to create a trust so far as any or all of such properties are concerned. The above are not simply invalid provisions annexed to a valid trust, but rather negative the creation of any valid irrevocable trust at all. Where the author of an alleged

HINDU LAW—*continued.*

4. CHARITABLE TRUSTS—*concluded.*

trust intended to create a trust only enforceable after his death, reserving power to himself to dispose of the properties, such trust cannot, after his death, be enforced at the instance of a volunteer even so far as the properties as he may not have disposed of are concerned A trust will be void, if the subject of it is uncertain, as when it is to attach to such properties as the author should not dispose of during his life. The doctrine applied by Courts of Equity in regard to transactions between persons standing in the fiduciary relation of father and child will apply even when the father takes only as trustee. The ground of interference in such cases is not any benefit derived by the father, but the presumption that the son was not a free agent. The rule will apply when the person claiming is a volunteer with notice of the confidential relation; and the burden will be on such person to show that the son understood the terms and did form an independent opinion on the matter. Recitals in the deed calculated to produce irresistible moral pressure, as the alleged wishes of ancestors, etc., will be evidence of an improper exercise of parental influence, when such recitals are not true. *By Court.*—S. 575 of the Code of Civil Procedure does not apply in the case of appeals under cl. 15 of the Letters Patent from judgments of the High Court in the exercise of its Original Jurisdiction. Under cl. 36 of the Letters Patent, where the Judges are equally divided in opinion, the judgment of the Senior Judge will prevail. ROOP LAUL *v.* LAKSHMI DOSS (1905).

I. L. R. 29 Mad. 1

5. DAMDUPAT.

——— *Interest—Damdupat—Interest accrued due not affected by the rule of damdupat.*—Plaintiff advanced R714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover R33-9-2, being the amount of interest over the amount from the date of the loan to the date of its repayment. The defendant raised the plea of *damdupat*, alleging that no sum was due as principal at the date of suit, so none could be recovered by way of interest. *Held*, that the claim should be allowed; since the rule of *damdupat* had no application to a right that has already accrued. The rule of *damdupat* does not divest rights that have accrued; it merely limits accruing rights. A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off. NUSSERWANJI *v.* LAXMAN (1906) . I. L. R. 30 Bom. 452

6. DAYABHAGA.

——— *Dayabhaga—Succession - Stridhan of childless married woman—Ayantuka—Pitridatta—Anwadheya—Mother or husband, preferential heir.*—Where a father granted to a married daughter a mourasi and mukurari lease of lands, reserving an annual rent of R1,—*Held*, that the

HINDU LAW—*continued.*

6. DAYABHAGA—*concluded.*

interest conveyed to the daughter was her *Anwadheya Ayantuka stridhan*, within the meaning of the Dayabhaga. On her death her mother was entitled to succeed to the property in preference to her husband. The rule of succession under the Dayabhaga law in regard to the *pitridatta Ayantuka stridhan* property of a childless married woman discussed. *Jadoo Nath Siroar* v. *Bassant Kumar Chowdhury, 11 B. L. R. 286*: *s.c. 19 W. R. 264; Hurry Mohan Shaha* v. *Shonatun Shaha, I. L. R. 1 Calc. 275*; and *Gopal Chandra Pal* v. *Ram Chandra Pramanik, I. L. R. 29 Calc. 811*, referred to. RAM GOPAL BHATTACHARJEE *v.* NARAYAN CHUNDER BANDAPADHYA (1905).

10 C. W. N. 510
s.c. I. L. R. 33 Calc. 315

———*Self-acquisition—Dayabhaga — Father's right in property acquired by son—Ancestral property—Father's right to eject son from ancestral property—Improvement by son, effect of—Injunction—Decree—Form of decree—Injunction—Estoppel by conduct.*—Under the Hindu law, as expounded in the Dayabhaga, the father always takes a double share in acquisitions made by a son; if they have been made by the use of joint funds the father and the acquirer take two shares each and the rest of the brothers one share each; but if made without the use of joint funds the acquisitions are divided half and half between the father and the son; a father claiming a share of property acquired by his son is not bound to allow the son any share of the ancestral property in his hands. Where the defendant had made improvements and substantial additions to ancestral buildings standing on ancestral land belonging to his father, the plaintiff: *Held*, that, even if the improvements and additions were effected under circumstances, which entitled the son to their value and to a charge upon the land to the extent of such value, the plaintiff would be under no legal obligation to pay for them as a condition precedent to a decree for recovery of possession and that he would be entitled to a decree for ejectment. *Held*, further, that the defendant having trespassed upon plaintiff's property and having habitually molested him and destroyed the peace of his family, the plaintiff was entitled to an injunction restraining the defendant from entering upon any portion of the property without his consent. *Waterhouse* v. *Waterhouse, 22 Times L. Rep. 195*, not followed. Where the defendant was fully aware that the land, upon which he expended his money, was the property of the plaintiff, the latter would not be estopped from asserting his legal rights. Where, in a suit for ejectment from and injunction to restrain the defendant from entering upon property, the question of title to the property was only indirectly in issue, the injunction, which was granted, was directed to remain in force only, until the defendant obtained, if he could, a decree for possession of the property either in whole or in part. DHARMA DAS KUNDU *v.* AMULYADHAN KUNDU (1906).

I. L. R. 33 Calc. 1119
s.c. 10 C. W. N. 765

HINDU LAW—*continued.*

7. DEBTS.

——— *Liability of son for father's debt—Sale or mortgage by father binding only when there is a debt existing prior to the sale or mortgage.*—A sale or mortgage of joint family property by a father is binding on the son's share only, when there is an antecedent debt, *i.e.*, a debt existing prior to and independently of the sale or mortgage. Where the debt is incurred at the time of sale or mortgage it is not an antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad, I. L. R. 5 Calc. 148; Chidambara Mudaliar* v. *Koothaperumal, I. L. R. 27 Mad. 326,* dissented from; *Sami Ayyangar* v. *Ponnammal, I. L. R. 21 Mad. 28,* approved. VENKATARAMANAYA PANTULU *v.* VENKATARAMANA DOSS PANTULU (1905).

I. L. R. 29 Mad. 200

——— *Poliems—Impartible estate in the hands of a son, assets for payment of father's debts—Sale of right, title and interest which defendant alone possesses, effect of.*—Impartible estate taken by a son by heritage from his father is assets for the payment of the father's debts not contracted for immoral or illegal purposes, and may be attached and sold in execution of a decree for such debts. *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar, L. R. 9 I. A. 128,* referred to. Where subsequent to the passing of Act X of 1877, in execution of a decree against the owner of an impartible estate, such estate is brought to sale and the proclamation of sale describes the property sold as 'the right, title and interest of the defendant alone' in accordance with the form in force prior to the passing of Act X of 1877, the mere use of such words, which were omitted in the Act of 1877, does not necessarily imply that the interest sold is less than the full proprietary interest. That the law as then established by judicial decisions recognised only a limited interest in the owner, does not of necessity raise the implication in such cases. The nature of the debt and other circumstances may show that the full interest including that of the sons was actually brought to sale and purchased. *Abdul Aziz Khan* v. *Appayasami Naicker, I. L. R. 27 Mad. 131,* distinguished. VEERA SOORAPPA NAYANI *v.* ERRAPPA NAIDU (1906) . **I. L. R. 29 Mad. 484**

——— *Liability of sons for their father's debts—Debts incurred for immoral purposes—Money borrowed to discharge such debts—Burden of proof—Minority—Mortgage executed by a minor.*—One Shanker Singh, the owner of considerable property, both moveable and immoveable, incurred heavy debts for immoral objects and without any necessity. He died on the 24th of August, 1901, leaving two sons, Sheoraj Singh and Maharaj Singh, him surviving. Shankar Singh and his sons were members of a joint Hindu family. To pay off his father's debts, Sheoraj Singh, professing himself to be sole owner of his father's property, mortgaged a large part thereof to the Bank of Upper India to secure a loan of R3,00,000. Maharaj

HINDU LAW—*continued.*

7. DEBTS—*continued.*

Singh, the younger brother, joined in the mortgage, admitting his elder brother's right to the property mortgaged; but, at the date of the execution of the mortgage, Maharaj Singh was a minor. Subsequently the Bank of Upper India transferred their rights under this mortgage to one Balwant Singh. Balwant Singh brought a suit for sale on the mortgage against Sheoraj Singh and Maharaj Singh, and obtained a decree. Maharaj Singh appealed. *Held,* that, Maharaj Singh, being a minor at the date of the execution of the mortgage in suit, the mortgage was, as regards his interest in the mortgaged property, absolutely void. *Mohori Bibee* v. *Dharmadas Ghose, I. L. R. 30 Calc. 539,* followed. The plaintiff set up an alternative case to the effect that his suit was not based upon the mortgage alone, but also upon the pious duty of Hindu sons to pay their father's debts. *Held,* that if this case was open to the plaintiff on his pleadings, which was doubtful, the debts of Shankar Singh, to discharge which was the object of the transaction now before the Court, were on the facts of the case barred by limitation. *Narainsingh Misra* v. *Lalji Misra, I. L. R. 23 All. 209, Natasayyan* v. *Ponnusami, I. L. R. 16 Mad. 99,* and *Ramayya* v. *Venkataratnum, I. L. R. 17 Mad. 122,* referred to, and, inasmuch as it was Sheoraj Singh and not the Bank, who had paid off Shankar Singh's debts, neither the mortgagees nor their assignee, the plaintiff, could claim the benefit of s. 74 of the Transfer of Property Act, 1882. But if this were not so, it was open to the defendant, appellant, to show that the debts originally incurred by his father were tainted with immorality, and this it was found he had succeeded in doing. It was not under the circumstances, the case not being one in which ancestral property had passed out of the hands of the joint family, incumbent upon him to go further and show that when the debts were contracted his father's creditors were aware, or might have been aware, of the immoral purposes for which the money was borrowed. *Sed quære* whether the burden of proving that the creditors had made proper inquiries with a view to satisfying themselves that the money was not being borrowed for immoral purposes did not lie on the plaintiff? *Girdhari Lal* v. *Kantoo Lal, L. R. 1 I. A. 321, Suraj Bunsi Koer* v. *Sheo Proshad Singh, L. R. 6 I. A. 88, Hunoomanpersaud Panday* v. *Mazummat Babooee Munraj Koonweree, 6 Moo. I. A. 393, Beni Madho* v. *Basdeo Patak, I. L. R. 12 All. 99, Bhawani Bakhsh* v. *Ram Dei, I. L. R. 13 All. 216, Pem Singh* v. *Partab Singh, I. L. R. 14 All. 179, Musammat Jannuk Kishoree Koonwur* v. *Baboo Raghunandan Singh, 1 S. D. A. L. P. 1861, 213, Mussammat Nanomi Babuasin* v. *Modun Mohun, L. R. 13 I. A. 1, Jamna* v. *Nain Sukh, I. L. R. 9 All. 493, Bhagbut Parshad* v. *Girja Koer, I. L. R. 15 Calc. 717; Chintamanrav Mehendale* v. *Kashinath, I. L. R. 14 Bom. 320, Badri Prasad* v. *Madan Lal, I. L. R. 15 All. 75,* and *Debi Dat* v. *Jadu Rai, I. L. R. 24 All. 459,* referred to. Where debts have been incurred for immoral purposes by the father in a

HINDU LAW—*continued.*

7. DEBTS—*concluded.*

joint Hindu family and then money is borrowed from a third party to pay off such debts, and such third party seeks to recover from the son the money so borrowed, the son is competent to put forward as a defence the immoral character of his father's original debts. He is not confined in his pleadings to the circumstances of the loan taken to pay off those debts. *Saravana Tevan* v. *Muttayi Ammal, 6 Mad. H. C. Rep. 371,* followed. MAHABAJ SINGH *v.* BALWANT SINGH (1906) . . . **I. L. R. 28 All. 508**

8. DEBUTTER PROPERTY.

——— *Debutter property—Succession in management—Joint Hindu family—Mitakshara—Right of suit.*—In a family governed by the Mitakshara law a person on his birth becomes entitled jointly as *sebait* of *debutter* property held by the family. *Ukoor Doss* v. *Chunder Sekhur Doss, 3 W. R. Civil Rule 152,* approved, and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram, I. L. R. 23 Mad. 271: L. R. 27 I. A. 69,* referred to. Where in a family governed by the Mitakshara law the father and the uncle of the plaintiff had alienated ancestral *debutter* property for their own benefit, *Held,* that the plaintiff was entitled to maintain a suit to have it declared that the alienation was bad and ought to be set aside and possession of the property given to him. RAM CHANDRA PANDA *v.* RAM KRISHNA MAHAPATRA (1905).
I. L. R. 33 Calc. 507

9. ENDOWMENT.

——— *Religious endowment—Decree against head of mutt binds successor in execution proceedings—Decree on promissory note executed by head of mutt binds the mutt—Compromise decree, effect of—Parties to suits—Sishyas cannot be made parties.*—A decree passed against the head of a mutt as representing the mutt is binding on his successor, who cannot dispute the validity of the decree in execution proceedings, but can do so only by a properly framed suit. *Sudindra* v. *Budan, I. L. R. 9 Mad. 80,* referred to and followed. The head of the mutt represents the mutt even when the suit is brought on a promissory note executed by him and he cannot therefore question the validity of the transaction. The binding nature of the decree in such cases is not affected by the fact that it is based on a compromise. The sishyas or disciples of a mutt are not co-owners with the head of the mutt and have no such interest in the mutt property as will entitle them to be made parties in a suit to recover property from the head of the mutt. MANIKKA VASAKA DESIKAR *v.* BALAGOPALAKRISHNA CHETTY (1906).
I. L. R. 29 Mad. 553

——— *Endowment—Hereditary managers or trustees—Right of management vested by descent in two branches of a family—Relinquishment of right by junior branch to member of senior branch*

HINDU LAW—*continued.*

9. ENDOWMENT—*concluded.*

—Alteration thereby of turns of management—Continuous usage by senior branch—Delegation of duties of trustees.—On the death of the sole manager of a Hindu temple and endowed property attached to it, the managership of which was hereditary in his family without any beneficial interest in the endowed property or income, the office devolved on his male descendants by his two wives, there being four in each branch. Until 1881-82 one member of each branch took the management for one year in alternate succession. In 1882 the members of the junior branch relinquished their rights in the management in favour of the plaintiff, who was member of the senior branch and for 19 years immediately before suit there had been a settled order of succession amongst the members of the senior branch, the plaintiff, in each period of eight years taking five turns (one in his own right and four in the turns of each member of the junior branch), and the other members of the senior branch (of whom the defendant was one) taking one turn each. On the expiration of one of the defendants' turns of management on 13th July 1899 he made over the temple to the plaintiff, but retained the endowed property. In a suit brought on 3rd September 1900 to recover possession of it: *Held,* by the Judicial Committee (upholding the decision of the Courts in India), that the unbroken usage during the time the order of succession had continued was conclusive evidence against the defendant of a family arrangement to which the Court was bound to give effect, until it was validly altered, or superseded by a new scheme effected with the concurrence of all parties interested. It was one, which those parties were competent to make, without applying to the Court; and it was not for the defendant at his will and pleasure to disturb an arrangement of which he had on more than one occasion taken the benefit: nor could he in this suit set up the rights of the junior branch against the plaintiff. The manager of the temple was by virtue of his office the administrator of the property attached to it as regards which he was in the position of a trustee. As regards the service of the temple and the duties appertaining to it he was in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which in course of time had become vested by descent in more than one person. In such a case in order to avoid confusion it was not unusual, and certainly not improper, for the interested parties to arrange amongst themselves for the due execution of the functions belonging to the office, in turns, or in some settled order and sequence. There was no breach of trust in such an arrangement nor any improper delegation of the duties of a trustee. RAMANATHAN CHETTI *v.* MURUGAPPA CHETTI (1906).
I. L. R. 29 Mad. 283
s.c. 10 C. W. N. 825

10. EXECUTOR.

——— *Executor de son tort—Hindus.*—The Principles of English Law relating to an executor

HINDU LAW—*continued.*

10. EXECUTOR—*concluded.*

de son tort are equally applicable to Hindus. *Jogendra Narain* v. *Emily Temple, Ind. Jur. 2 N. S. 235,* followed. *Suddasook* v. *Ram Chunder, I. L. R. 17 Calc. 620-9; Prasunno* v. *Kristo, I. L. R. 4 Calc. 342; Janaki* v. *Dhanu Lal, I. L. R. 14 Mad. 454,* referred to. RADHIKA MOHON ROY v. BONNERJEE (1905) . **10 C. W. N. 566**

11. GIFT.

——— *Gift—Settlement on persons then in existence at close of a life in being valid—Trusts Act (II of 1882), s. 6—Transfer of Property Act (IV of 1882), ss. 14, 15 and 123—Trust validly created by registered instrument without delivery of possession—Ss. 14 and 15 of the Transfer of Property Act do not affect any rule of Hindu Law.*—*R* by a registered deed of settlement settled property in trust and after making various provisions for the maintenance of himself and his wife and his grand-daughters *V* and *R*, further provided that, on the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand-daughters, who attain 18 and the daughters of the grand-daughters, who should attain that age or marry. A female child on the consummation of marriage or on attaining 18 was to be given Rl,000, and a male child on attaining that age was to be given his share of the property. The settlor did not give possession of the properties to his trustees, but remained in possession till his death. In a suit by the reversioners of *R* to set aside the settlement as null and void. *Held*, that a transfer of property and a valid declaration of trust were effected by the registered deed though unaccompanied by physical delivery of possession and that nothing in s. 6 of the Trusts Act was in conflict with this view. *Held*, also, that the settlement by way of remainder in favour of the sons of *V* and *R* (such sons being in existence at the date of the settlement) was valid under the Hindu Law. A settlement by way of remainder to take effect on the happening of an event following immediately on the close of a life in being is good. *Sreemutty Soorjumoney Dossu* v. *Denobundoo Mullick, 9 M. I. A. 134,* followed. A bequest to a class, some of whom could not take, is not void, but will enure for the benefit of such of the class, who can take. The rule in *Leake* v. *Robinson, 2 Mer. 363,* does not apply to the wills of Hindus. *Bhagabati Barmanya* v. *Kali Charan Singh, I. L. R. 32 Calc. 992,* referred to and followed. *Ram Lal Set* v. *Kanai Lal Set, I. L. R. 12 Calc. 663,* referred to and followed. Ss. 14 and 15 of the Transfer of Property Act do not affect the rule of Hindu Law above stated and do not apply to Hindu wills. In determining the validity or otherwise of dispositions of property under ss. 14 and 15 of the Transfer of Property Act regard must be had to possible events and not to events as they have actually happened; and if it is possible that the vesting may be postponed beyond the limits fixed by the sections, the disposition will be bad, although, as events actually happened, it

HINDU LAW—*continued.*

11. GIFT—*concluded.*

was not so postponed. RANGANADHA MUDALIAR *v.* BAGHIRATHI AMMALL (1906).

I. L. R. 29 Mad. 412

——— *Gift—Construction of deed of gift—Immoveable property—Estate of inheritance—Life-estate—Gift to a married woman—Ayantuka Strishan, descent of—Petition—False statement—Decree—Mesne profits.*—A deed of gift of immoveable property made by a Hindu in favour of his sister after her marriage was to the following effect.—"you shall pay the annual Government revenue and get your name registered . . . and enjoy possession during your life-time. On your death your husband, sons, grandsons and other heirs in succession will continue to enjoy and possess. The power to dispose of by gift or sale will successively vest in your husband, sons, grandsons and others." *Held* (affirming the decision of the High Court), that on its true construction the deed conveyed an estate of inheritance. The words were sufficient to show that the heirs were to succeed as such notwithstanding that they were not enumerated in the proper order. The property being "ayantuka stridhan," and the donee having no son, it would descend to her only unmarried daughter, the plaintiff. Where the husband of the donee, who was the plaintiff's natural guardian, had obtained possession by an untrue representation in his petition for mutation of names that his wife had died childless, mesne profits were held to have been rightly decreed from the date of his wife's death, and not limited to the three years before suit. BASANTA KUMARI DEBI *v.* KAMIKSHYA KUMARI DEBI (1905).

I. L. R. 33 Calc. 23
s.c. 10 C. W. N. 1

12. INHERITANCE.

——— *Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha—Succession to stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, Chapter IV, s. 10, placita 28 and 30, construction of.*—By the Hindu law of the Bombay School, *viz.*, the Mitakshara subject to the doctrine to be found in the Vyavahara Mayukha where the latter differs from it, a co-widow is entitled to succeed to the property of a woman dying without issue, in preference to her husband's brother or husband's brother's son. A deed executed by a Hindu in favour of his future wife conveyed immoveable property to her, "her heirs, executors, administrators, and assigns" on the condition that, if she died "without leaving issue of the intended marriage, who shall succeed to a vested interest" in the property, and without exercising a power of appointment given her by the deed, then "the property shall vest in her legal heirs according to the Hindu law of the Bombay School." *Held*, that she took an absolute estate of inheritance in the property. The true construction of *placitum* 30 of Chapter IV, s. 10, of the Vyavahara Mayukha, and one that brings it into

HINDU LAW—*continued.*

12. INHERITANCE—*continued.*

harmony with the Mitakshara, and also reconciles it with *placitum* 28, is that it should be read distributively as regards the property of women married according to one of the approved forms and the property of those married in one of the lower forms. In the one case those of the heirs enumerated by Brihaspati, who are blood relations of the husband, namely, the husband's sister's son, the husband's brother's son, and the husband's brother will succeed to the woman's property and in the other case the relations of the father will succeed. The order of succession is not indicated in the series of heirs enumerated by Brihaspati. The solution is to be found by reference to *placitum* 28 in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow nor any other sapinda of the husband is excluded. The words "and the rest" mean or include the other relations of the husband or father. The co-widow therefore takes in her right place and is a preferential heir to the husband's brother or husband's brother's son. BAI KESSERBAI *v.* HUNSRAJ MORARJI (1906) . . **I. L. R. 30 Bom. 431**
s.c. L. R. 33 I. A. 176
10 C. W. N. 802

——— *Re-union—Inheritance—Heirs—Special heirs—Mitakshara—Re-union not affecting inheritance.*—According to the Mitakshara, re-union is restricted to three classes of cases, namely, (1) between father and son, (2) between brothers and (3) between maternal uncle and nephews. Under the Hindu law as laid down in the Mitakshara, there cannot be a valid re-union between first cousins, who were originally joint, but had subsequently separated. *Visvanath Gangadhar* v. *Krishnaji Ganesh, 8 Bom. H. C. (A. C. J.) 69 ; Lakshmibai* v. *Ganpat Moraba, 4 Bom. H. C. (O. C. J.) 150 ; Abhai Churn Jana* v. *Mangal Jana, I. L. R. 19 Calc 684 ; Balkishen Das* v. *Ram Narain Sahu, I. L. R. 30 Calc. 738 : L. R. 30 I. A. 139 : 7 C. W. N. 4815,* referred to. BASANTA KUMAR SINGHA *v.* JOGENDRA NATH SINGHA (1905) . **I. L. R. 33 Calc. 371**
s.c. 10 C. W. N. 236

——— *Inheritance—Special heirs—Females—Estate inherited by two widows—Alienation by one widow—Widow—Power of widow—Alienation by one of two co-widows—Parties adding plaintiffs—Non-joinder—Joinder of plaintiff after time for bringing suit has expired—Effect of co-contractors—Limitation Act (XV of 1877), s. 22.*—Where two Hindu widows, *D M* and *D R*, who on the death of their husband took under the Mitakshara law a joint estate in the property of the husband, afterwards by arrangement between themselves divided the property between them, intending to give to each so far as the other was concerned full power of alienation in the event of legal necessity, and one of them, *D R*, made a gift of her share in the estate to the reversioners, who thereafter in certain transactions proceeded on the assumption that there was a

HINDU LAW—*continued.*

12. INHERITANCE—*concluded.*

partition between the widows, not only of possession of the property included in the husband's estate, but also of the title. *Held,* that a mortgage executed in favour of the plaintiff by *D M* of her share without the consent of *D R,* was binding on the property hypothecated under it so far as the interests of *D R* and the reversioners were concerned, to the extent that the debt was incurred for legal necessity. The addition after the expiry of the period of limitation of an infant member of a Mitakshara family as plaintiff to a suit on a mortgage is not fatal to the suit. *Guruvayya Gouda* v. *Dattatraya Anant, I. L. R. 28 Bom. 11,* followed. THAKURMANI SINGH *v.* DAI RANI KOERI (1906) . **I. L. R. 33 Calc. 1079**

13. JOINT FAMILY.

——— *Joint Hindu family—Ancestral property—Self-acquired property—Property inherited from collateral, acquired after litigation supported by joint family funds*—The head of a joint Hindu family owning a large amount of joint ancestral property acquired by inheritance from a collateral branch of the family property both moveable and immoveable after litigation ending in a compromise. This litigation was carried on by means of money belonging to the joint family business. *Held,* on a finding that the business of the family usually necessitated the existence of a very large floating balance, and that the money used for this litigation was in a short time re-credited by the head of the family in the family accounts, that the money should be treated as borrowed, that there was no appreciable detriment to the ancestral property, and consequently the property, which passed under the compromise above referred to, was self-acquired and not ancestral property. *Rani Mewa Kunwar* v. *Rani Hulas Kunwar, L. R. 11 I. A. 157,* and *Rai Nursing Das* v. *Rai Narain Das, 3 All. H. C. 217,* referred to. BACHCHO KUNWAR *v.* DHARAM DAS (1906).
I. L. R. 28 All. 347

——— *Action in ejectment—Issue as to alleged personation by plaintiff—Admissibility and effect of ex parte official inquiries.*—In an action brought in 1894 by the presumptive collateral heir to a deceased Hindu to recover his estate from the appellant as having been substituted for the real heir, who was admittedly born in 1881, but was alleged by the plaintiff to have died in 1883, it appeared that a former suit had been brought in 1885 by the then collateral heir against the appellant and others for a similar purpose after his pleader had, in furtherance of a criminal charge of personation against the appellant's mother, instituted with the assistance of the authorities two secret and official inquiries with the object of either preventing or proving the crime charged. The first Court dismissed the suit, the alleged substitution not having been proved, but the High Court considered that the plaintiff's case was supported by overwhelming circumstantial evidence, meaning the

HINDU LAW—*continued.*

13. JOINT FAMILY—*continued.*

proceedings at and the results of the said enquiries,—*Held*, allowing the appeal, that having regard to the purpose, the nature and the circumstances of the said inquiries, which were not in any sense judicial, but were made *ex parte* in order to obtain support to a foregone conclusion, the said proceedings and results were not, even if admissible, entitled to any weight. CHANDRASANGJI HIMATSANGJI *v.* MOHANSANGJI HAMIRSANGJI (1906).

L. R. 33 I. A. 198
s.c. I. L. R. 30 Bom. 523

——— *Joint Hindu family—Mortgage of ancestral property by father—Sale under decree on mortgage—Suit by sons to redeem their interests.*—Where ancestral property of a joint Hindu family has been sold in execution of a decree upon a mortgage executed by the father, no suit for redemption of their interests is maintainable by the sons upon the ground solely that they were not made parties to the suit under the decree in which the ancestral property was sold. *Debi Singh* v. *Jai Ram, I. L. R. 25 All. 214, Banke Rai* v. *Raghubir, S. A. No. 641 of 1903, decided 6th August 1904,* followed. *Girdharee Lall* v. *Kantoo Lall, L. R. 1 I. A. 321,* referred to. LAL SINGH *v.* PULANDAR SINGH (1905) . . . **I. L. R. 28 All. 182**

——— *Joint Hindu family—Sale of ancestral property by the father with no antecedent debt or valid necessity to support it—Suit by sons to set aside sale so far as affecting their interests.*—A sale of ancestral property by the father in a joint Hindu family may be set aside on suit by the sons so far as it affects their interests in the property, if there is no antecedent debt or valid necessity to support it, although the transaction may not be shown to be tainted with immorality. *Manbahal Rai* v. *Gopal Misra, Weekly Notes, 1901, p. 57,* followed. *Debi Prasad* v. *Jai Karan Singh, I. L. R. 24 All. 479,* referred to. *Debi Singh* v. *Jai Ram, I. L. R. 25 All. 814,* distinguished. While an appeal on behalf of two minor appellants was pending in the High Court, the guardian *ad litem* and also one of the appellants themselves died. The appeal was decreed without these matters having been brought to the notice of the Court. *Held,* that this was no more than an irregularity, which was cured by the subsequent appointment of a guardian *ad litem* pending an appeal under s. 10 of the Letters Patent. RAM DAYAL *v.* AJUDHIA PRASAD 1906) . . . . . **I. L. R. 28 All. 328**

——— *Suit against father and son on promissory note given by father—Son exempted from liability on the note—Liability of son as member of a joint family.*—In a suit brought against father and son in a joint Hindu family upon a promissory note executed by the father alone, the son was exempted from liability on the note on the ground that he was no party to it: in other words the suit as against the son was dismissed. A decree, however, was passed against the father, and in execution thereof

HINDU LAW—*continued.*

13. JOINT FAMILY—*concluded.*

the decree-holder's assignee caused a portion of the joint family property to be sold. *Held,* on a suit by the son for a declaration exempting his interest in the joint family property that the dismissal as against him for the suit on his father's promissory note left him still liable as a Hindu son to pay his father's debt, unless—which was not suggested here—the debt was tainted with immorality. SHIAM LAL *v.* GANESHI LAL (1905).

I. L. R. 28 All. 288

——— *Partition—Purchaser of portion of property belonging to a joint Hindu family—Such purchaser competent to obtain partition of a part only of the property purchased by him.*—It is competent to the purchaser of property belonging to a joint Hindu family to have, if he is so desirous, a portion only of the property, which he has purchased, partitioned: he is not bound to include in his suit for partition the whole of the property which he has purchased. *Sreemati Padmamani Dasi* v. *Srimati Jagadamba Dasi, 6 B. L. R. 134,* followed. RAM MOHAN LAL *v.* MUL CHAND (1905).

I. L. R. 28 All. 39

——— *Right to sue for partition of a portion of the joint family property.*—One of two brothers, who formed a joint Hindu family, sold his own interest in a portion of the joint family property. *Held,* that it was competent to the other brother to sue for partition of his share in the property so dealt with without asking also for partition of the remainder of the joint family property. *Lachmi Narain* v. *Janki Das, I. L. R. 23 All. 216,* and *Subramanya Chettyar* v. *Padmanabha Chettyar, I. L. R. 19 Mad. 267,* followed. RAM CHARAN *v.* AJUDHIA PRASAD (1905) . . . **I. L. R. 28 All. 50**

14. MAINTENANCE.

——— *Transfer of Property Act (IV of 1882), s. 39—Maintenance of Hindu widow—Whether charge upon the estate—Hindu Law—Mitakshara School—Transfer of estate with intention to defeat right—Fraudulent intention—Purchaser with notice, position of.*—When immoveable property, from the profits of which a Hindu widow was entitled to receive her maintenance, was sold and the sale-deed recited that the amount of maintenance would continue to be paid to the widow by the vendor and that the property sold would not be subject to any charge for it. *Held,* that this mere recital was not enough for holding that the conveyance was executed with the intention of defeating the right of the maintenance-holder, within the meaning of s. 39 of the Transfer of Property Act. It was necessary to enquire whether at the time of the sale, there was sufficient property left in the hands of the vendor out of which the amount of maintenance could be realised, and, if there was not, whether the vendee was aware of the fact. The intention to defeat the right of the maintenance-holder against which provision is made in s. 39 of the Transfer of

HINDU LAW—*continued.*

14. MAINTENANCE—*concluded.*

Property Act, involves the idea of a fraudulent intention. *Ram Kunwar* v. *Ram Dai, I. L. R. 22 All. 326*, approved. Under the Mitakshara the maintenance of a widow is not a charge upon the estate of her deceased husband. *Lakshman Ram Chandra Joshi* v. *Sattya Bhama Bai, I. L. R. 2 Bom. 494; Adhirani Narain Coomari* v. *Shonamali Pat Mahadai, I. L. R. 1 Calc. 365; Ram Kunwar* v. *Ram Dai, I. L. R. 22 All. 326; Bharatpore State* v. *Gopal Dai, I. L. R. 24 All. 160; Lakshman Ram Chandra* v. *Saraswati Bai, 12 Bom. H. C. 69*, relied on. *Musst. Khukroo Misrain* v. *Jhoomuk Lal Das, 15 W. R. 263; Goluk Chandra Bose* v. *Rani Ohilla Dayee, 25 W. R. 100*, not followed. DIGAMBARI DEBI *v.* DHAN KUMARI BIBI (1906) . . **10 C. W. N. 1074**

——— *Maintenance, grant for—Danpatra in favour of a sister—Construction—Absolute estate, though donee's heirs wrongly enumerated—Ayantaka stridhan—Succession—Dispossession by natural guardian by untrue representation—Decree for possession—Mesne profits.*—C executed in favour of his younger sister a *danpatra*, which declared that the donor did of his own free will make a gift to the donee of an eight annas share of a certain mouzah for her maintenance. The document further provided that "you (the donee) shall pay the annual Government revenue of the said share to the Collectorate and get your name registered" to that extent "and enjoy possession during your lifetime. On your death your husband, sons, grandsons and other heirs in succession will continue to enjoy and possess. The power to dispose of by gift or sale will successively vest in your husband, sons, grandsons and others." *Held*, on the construction of the *danpatra*, that the donee took an heritable estate, it being apparent that her heirs, though wrongly enumerated, were intended to succeed as such. *Held*, further, that the property having been given to the donee, when married, became her "*ayantaka stridhan*," so that on her death her only unmarried daughter became entitled to succeed to it in preference to her husband. The donee died on 31st May 1879 and thereupon her husband applied to have his name registered in lieu of the donee's, falsely stating that she had died childless and had his name registered on the 27th May 1880. The present suit was instituted by the donee's only daughter on the 22nd January 1897 to recover possession of the properties from the widow of the husband, who had died on the 23rd February 1893. The plaintiff having obtained a decree for possession it was held, that having regard to the fact that the plaintiff was dispossessed by her natural guardian and that by means of an untrue representation she was entitled to get mesne profits from the date of her mother's death and not merely for three years before suit. BASANTA KUMARI DEBI *v.* KAMIKSHYA KUMARI DEBI (1905).

10 C. W. N. 1
s.c. I. L. R. 33 Calc. 23

HINDU LAW—*continued.*

15. MARMAKATAYAM.

——— *Marmakatayam Law—Division amongst joint owners, when binding on minors—Arrangement not binding to which all members are not parties.*—Joint owners governed by the Marmakatayam Law can allow one or more of themselves to take any portion of the joint property as his or their separate property. Such transaction requires the consent of every one interested in the property, and where there are minors incapable of consenting the transaction to be binding on the Tavazhi must be for consideration and beneficial to the family as a whole. ARAYALPRATH KUNHI POCKER *v.* KANTHILATH AHMAD KUTI HAJI (1905).

I. L. R. 29 Mad. 62

16. MARRIAGE.

——— *Marriage—Succession—Marriage between a Brahman and Chhattri illegal.*—*Held*, that whatever may have been the case in ancient times, and whatever may be the law in other parts of India, at the present day a marriage between a Brahman and a Chhattri is not a lawful marriage in these Provinces, and the issue of such a marriage is not legitimate. The defendant pleaded that the parties were governed by a Nepalese custom by which a Brahman could lawfully marry the daughter of a Chhattri. *Semble*, that the custom set up, not being an ancient family custom but merely a territorial custom, would, if in fact it existed, be applicable only to indigenous Nepalese subjects and perhaps to others permanently domiciled in Nepal. *Soorendro Nath Roy* v. *Mussamut Heeramonee Burmoneah, 1 Moo. I. A. 814*, referred to. PADAM KUMARI *v.* SURAJ KUMARI (1906) . . . . **I. L. R. 28 All. 458**

17. MITAKSHARA.

——— *Mitakshara — Mayukha — Succession to stridhan property of childless Hindu widow—Co-widow preferred to husband's brother and brother's son—"Sapinda," meaning of—Construction of texts, rule of—Island of Bombay, succession in.*—Under the Mitakshara as also under the Mayukha as read with the Mitakshara, a co-widow is entitled to succeed to the *stridhan* property of a widow dying without issue in preference to her husband's brother or brother's son. According to the Mitakshara definition of *sapinda*, husband and wife are *sapindas* to each other and the same theory has been adopted by the author of the Mayukha. The rule of succession to the *stridhan* property of a childless widow laid down in the Mitakshara and adopted in pl. 28 of the Mayukha, was not intended to be modified in its operation by what is stated in pl. 30 of the same work. The proper construction of the text of Brihaspati in pl. 30 indicated. Shama Churn's Construction of the text approved. *Lallubhai Bapubhai* v. *Mankuvarbai, I. L. R. 2 Bom. 388; Gajabai* v. *Shrimant Shahajirao Maloji Raje Bhosle, I. L. R. 17 Bom. 114, 118, Bachha Jha* v. *Jugmon Jha, I. L. R. 12 Calc. 349, Krisnabai*

HINDU LAW—*continued.*

17. MITAKSHARA—*concluded.*

Martand v. *Sripati Pandu, 8 B. L. R. 12,* referred to. Questions of the Hindu law of inheritance to property in the Island of Bombay are to be determined in accordance with the Mitakshara, subject to the doctrine to be found in the Mayukha where the latter differs from it. But as a general principle, the Mitakshara and the Mayukha should be so construed as to harmonize with one another wherever and so far as that is reasonably possible. *Gajabai* v. *Shrimant Shahajirao Maloji Raja Bhosle, I. L. R. 17 Bom. 114, 118,* referred to. BAI KESSERBAI v. HUNSRAJ MORARJI (1906) . . . **10 C. W. N. 802**
s.c. L. R. 33 I. A. 176
I. L. R. 30 Bom. 431

——— *Mitakshara—Re-union between two first cousins, if valid.*—Under the Hindu law as laid down in the Mitakshara there cannot be a valid re-union between two first cousins, who were originally joint, but had subsequently separated. BASANTA KUMAR SINGHA v. JOGENDRA NATH SINGHA (1905) . . . **10 C. W. N. 236**
s.c. I. L. R. 33 Calc. 371

——— *Mitakshara—Co-widows—Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband.*—According to the Mitakshara a surviving co-widow is entitled to succeed to the *stridhan* property of her deceased co-widow as the nearest surviving *Sapinda* of the husband. KRISHNAI v. SHRIPATI (1905).
I. L. R. 30 Bom. 333

——— *Mitakshara family — Survivorship—Civil Procedure Code (Act XIV of 1882), ss. 234, 244—Decree—Mortgage decree against father—Execution against representative—Right to raise question as to validity of decree—Immoral debt.*—A mortgage decree made against a person governed by the Mitakshara law may after his death be executed against his son, who claimed the mortgaged properties by survivorship, although the latter was no party to the suit upon the mortgage. The son would be permitted to have the question tried under s. 244 of the Civil Procedure Code as to whether the debt had been contracted for immoral purposes. CHANDER PERSHAD v. SHAM KOER (1905).
I. L. R. 33 Calc. 676

18. PARTITION.

——— *Partition — Evidence — Associating agnatic relations in the management of estate—Maintenance in lieu of services—Marriage expenses, payment of.—Held,* on the evidence, that there was a partition of the family property, so that the property in dispute was the separate property of the last male holder and that he did not hold it merely as a manager of a joint Hindu family. The fact that he availed himself of the services of the near agnatic relations in the administration of his property at the same time that he gave them maintenance and paid the expenses of their marriage and other ceremonies was not inconsistent with the position as a separated member. It was both natural and probable. DEOKI SINGH v. ANUPA SINGH (1905).
10 C. W. N. 338

HINDU LAW—*continued.*

18. PARTITION—*concluded.*

19. REVERSIONARY RIGHT.

——— *Reversionary right, nature of—Transfer of Property Act (IV of 1882), s. 6.*—The right of a presumptive reversionary heir under Hindu Law is no more than a *spes successionis* or expectancy of succeeding to the property. Such expectancy cannot be transferred under s. 6 of the Transfer of Property Act. MANICKAM PILLAI v. RAMALINGA PILLAI (1905) . . **I. L. R. 29 Mad. 120**

——— *Reversioner, suit by, to set aside adoption—Reversioner in such suit represents all interested in the reversion, but does not in suits questioning alienations—Alienation by limited owner gives rise to only one cause of action.*—Although in suits relating to alienations by a qualified owner, the presumptive reversioner cannot, on the current of authority, be held to represent remote reversioners, yet in suits to set aside an adoption, the presumptive reversioner ought on principle to be held to represent the remote reversioner, provided the matter is decided after a fair trial; and this principle will apply equally when a remote reversioner is allowed to sue under special circumstances to set aside an adoption. An unauthorised alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of alienation, to all reversioners. In such cases there is only one cause of action to be sued upon. The true purpose of the concession of a right of suit in these cases is the protection of the interest of the person or persons, who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. The reversioner actually suing does not only do so for himself, but also on behalf of all the rest. *Rani Anund Koer* v. *The Court of Wards, L. R. 8 I. A. 14, 22,* referred to. *Brojo Kishoree* v. *Sreenath Bose, 9 W. R. 463 at p. 465,* referred to. Suits involving questions as to adoptions stand on quite different grounds from those impeaching the validity of alienations. The grave and important nature of disputes relating to adoptions, makes it desirable that the adjudication in such cases should be made final as far as possible. Where the presumptive reversioner or with the permission of the Court, a more remote reversioner brings such a suit, the Court ought to require him to disclose the names of other persons interested in the reversion and direct notices to be served on them, to enable them to be made parties should they so desire. *Ayyadorai Pillai* v. *Solai Ammal, I. L. R. 24 Mad. 405,* approved. *Adilakshmi* v. *Venkataramayya, 13*

HINDU LAW—*continued.*

19. REVERSIONARY RIGHT—*concluded.*

M. L. J. 359, not followed. CHIRUVOLU PUNNAMMA *v.* CHIRUVOLU PERRAZU (1905). **I. L. R. 29 Mad. 390**

——— *Hindu widow—Effect of decree against widow in possession—Reversioners.*—A reversioner succeeding to an estate after the death of the widow of the former owner will be bound by a decree obtained against the widow, provided that there has been a fair trial of the suit in which such decree was passed. *Katama Natchiar* v. *The Rajah of Shivaganga, 9 Moo. I. A. 543*, and *Hari Nath Chatterjee* v. *Mothur Mohun Goswami, I. L. R. 21 Calc. 8*, followed. MADAN MOHAN LAL *v.* AKBARYAR KHAN (1905) . . . **I. L. R. 28 All. 241**

20. SEPARATE PROPERTY.

——— *Acquisitions out of salary, primâ facie separate property—Succession Certificate Act (VII of 1889), s. 19—Discretion of Court in granting certificate.*—Money connected with insurance, the premia for which are paid out of the salary of a deceased Hindu, is *primâ facie* his separate property. *Mahadeva Pandia* v. *Rama Narayana Pandia, 13 M. L. J. 75*, followed. Where an application for a succession certificate under Act VII of 1889 by the widow of the deceased in respect of such money is opposed by his brother on the sole ground that the deceased was educated at the family expense, the certificate ought to issue in favour of the widow RAJAMMA *v.* RAMAKRISHNAYYA (1905). **I. L. R. 29 Mad. 121**

21. SHEBAIT.

——— *Public religious endowment—Shebait, how far trustee—Office or dignity, holder of—Delegation of office—Palas or turns of worship—Family arrangement—How altered—Proof of*—The manager of a Hindu temple is by virtue of his office the administrator of the property attached to it. As regards the property the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity, which may have been originally conferred on a single individual, but which, in course of time, has become vested by descent in more than one person. In such a case, in order to avoid confusion or an unseemly scramble, it is not unusual, and it is certainly not improper, for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence. There is no breach of trust in such an arrangement nor any improper delegation of the duties of a trustee. The parties interested are competent to make such an arrangement without applying to the Court. A family arrangement so arrived at must hold good, until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested.

HINDU LAW—*continued.*

21. SHEBAIT—*concluded.*

Unbroken usage for a period of 19 years was held to be conclusive evidence of a family arrangement to which the Court was bound to give effect. RAMANATHAN CHETTI *v.* MURUGAPPA CHETTI (1906) . . . . **10 C. W. N. 825**
s.c. I. L. R. 29 Mad. 283

22. STRIDHAN.

——— *Mitakshara—Stridhanam, devolution of—Sister takes precedence over sister's son—Nature of right.*—Under the Mitakshara Law, where a woman not married in any of the approved forms dies issueless, her *stridhanam* property, in the absence of nearer heirs, passes to the sister in preference to the sister's son. The Mitakshara is the paramount authority in this Presidency and in the absence of a consensus of opinion among the commentators, and where there is no evidence of usage to the contrary, the general doctrine of Mitakshara Law must prevail over the Smriti Chandrika. A woman taking *stridhanam* property of a deceased female by inheritance will take only a limited interest in such property. *Muthappudayan* v. *Ammani Ammal, I. L. R. 21 Mad. 58 at p. 62*, referred to. *Selemma* v. *Latchmana Reddi, I. L. R. 21 Mad. 100 at pp. 103 and 104*, referred to. RAJU GRAMANY *v.* AMMANI AMMAL (1906) . **I. L. R. 29 Mad. 358**

——— *Stridhan—Succession—Full brothers of the husband are entitled to succeed in preference to his half-brothers—Mitakshara.*—A Hindu widow died without issue leaving her surviving one whole brother and three half-brothers of her deceased husband: *Held*, that under the Mitakshara by which the parties were governed, for the purpose of succession to the non-technical *stridhan* of a widow, who has died without issue, the whole brother of her deceased husband is to be preferred to his half-brother. PARMAPPA *v.* SHIDDAPPA (1906). **I. L. R. 30 Bom. 607**

——— *Stridhan—Property of daughter received from father after marriage—Maurasi mukarari lease, rent nominal—Anwadheya—Devolution of stridhan belonging to a childless woman.*—When a *maurasi* and *mukarari* lease of a property was granted by a father to his daughter after her marriage, reserving merely the right to receive a nominal sum annually:—*Held*, that under the Dayabhaga the interest in the property transferred to the daughter under the lease was her *stridhan* falling within the class *Anwadheya*, and that on her dying childless her mother was entitled to inherit it in preference to her husband. *Junon Nath Sirkar* v. *Busunt Coomar Roy Chowdhry, 19 W. R. 264*: *11 B. L. R. 286*; *Hurry Mohun Shaha* v. *Shonatun Shaha, I. L. R. 1 Calc. 275*; and *Gopal Chandra Paul* v. *Ram Chandra Pramanik, I. L. R. 28 Calc. 311*, referred to. RAM GOPAL BHUTTACHARJEE *v.* NARAIN CHANDRA BANDOPADHYA (1905) . **I. L. R. 33 Calc. 315**
s.c. 10 C. W. N. 510

HINDU LAW—*continued.*

22. STRIDHAN—*concluded.*

———— *Saudayik—Bequest by will—Power of disposal subject to husband's consent—Gurav service—Vritti.*—Saudayik stridhan is that which is obtained by a married woman or by a virgin in the house of her husband or of her father, from her brother or parents. Except in the kind known as Saudayik, a woman's power of disposal over her stridhan is during coverture subject to her husband's consent, and without such consent she cannot bequeath it by will when she is survived by her husband, who is not shown ever to have consented to the will. BHAU *v.* RAGHUNATH (1906).

I. L. R. 30 Bom. 229

———— *Succession—Stridhan—Full brothers of the husband are entitled to succeed in preference to his half-brothers—Mitakshara—Hindu Law.*—A Hindu widow died without issue leaving her surviving one whole brother and three half-brothers of her deceased husband. *Held*, that under the Mitakshara, by which the parties were governed, for the purpose of succession to the non-technical stridhan of a widow, who has died without issue, the whole brother of her deceased husband is to be preferred to his half-brother. PARMAPPA *v.* SHIDDAPPA (1906) . . **I. L. R. 30 Bom. 607**

23. SUCCESSION.

———— *Palayam or Polliem—Succession to—Impartibility—Grant of sanad under Reg. XXV of 1802—Effect of—Lineal primogeniture, when estate held in co-parcenary—Maintenance, amount of—Privy Council, practice of, to interfere with amount settled in India.*—The question whether an estate is subject to the ordinary Hindu Law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. *Srimantu Raja Yarlagadda Mallikarjuna* v. *Raja Yarlagadda Durga*, *L. R. 17 I. A. 184*, followed. Acceptance of a sanad in common form under Reg. XXV of 1802 does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate. The zemindari of Udayarpalayam in the Carnatic, represents the ancient Palayam of Udayar, having been granted and accepted, after the cession of the Carnatic, as equivalent in value to the ancient Palayam. It has retained its impartible character in spite of the acceptance by the Poligar of a sanad under Reg. XXV of 1802 as is corroborated by the fact that, since the grant of the sanad, the zemindari has been uniformly enjoyed as an impartible estate. When impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line. *Naraganti* v. *Venkatachalapati*, *I. L. R. 4 Mad. 250*, followed. It is not the practice of the Judicial Committee to interfere in a question as to the amount of maintenance. That is a matter with which the Courts in India are better qualified to deal. KACHI KALIYANA REN-

HINDU LAW—*continued.*

23. SUCCESSION—*continued.*

GAPPA KALAKKA THOLA *v.* KACHI YUVA RENGAPPA KALAKKA THOLA UDAYAR (1905).

10 C. W. N. 95

———— *Impartible property—Liability of, for debts in the hands of successor—Impartible property, which is not self-acquired, is not assets for debts of previous holder.*—Debts contracted by the holder of an impartible estate, which is not such holder's self-acquired property, are not binding on his successor, who takes by survivorship, when they are contracted for purposes which will not be binding on him, if the property was ordinary partible property; and such property is not assets in the hands of the successor for the payment of such debts, because he could not have questioned any alienation of the same by his predecessor. *Per* SANKARAN NAIR, *J.*—An undivided member, who succeeds to ancestral impartible property to the exclusion of nearer heirs of the last holder, does so only by right of survivorship. *Katama Nachiar* v. *The Raja of Sivaganga*, *9 M. I. A. 539, 611, 614*; and not simply as a member of the family of which he and the last holder were undivided members. When the acquisition or recognition of ownership is due to a process of evolution or to judicial decisions extending over a comparatively long period of time, such ownership may carry with it certain incidents appropriate to it in its earlier stages, but from which rights of ownership acquired in well-known and recognized modes are free. The decisions which, by negativing co-parcenary rights in impartible estates and the power of questioning alienations incidental thereto, have recognised ownership in the holders of such estates do not therefore render it necessary to disregard the course of decisions in the Presidency and hold that such estate in the hands of the successor must be treated as assets for the payment of debts contracted by his predecessor. NACHIAPPA CHETTIAR *v.* CHINNAYASAMI NAICKER (1906).

I. L. R. 29 Mad. 453

———— *Succession—Bandhus—Father's sister's daughter's son entitled in preference to paternal grandfather's sister's son.*—It is a cardinal principle of Hindu Law that the nearer line excludes the more remote and the ground of distinction in favour of a party, who is able to trace his descent with less intervention of females will not apply where he competes with one of a nearer line. The father's sister's daughter's son, being an *atmabandhu*, is entitled to succeed in preference to the paternal grandfather's sister's son—a *pitribandhu*. *Balusami Pandithar* v. *Narayana Rao*, *I. L. R. 20 Mad. 342*, referred to. KRISHNA AYYANGAR *v.* VENKATARAMA AYYANGAR (1906) . . **I. L. R. 29 Mad. 115**

———— *Kutchi Memons—Succession—Sons administering the property of their deceased father.*—Among the Kutchi Memons, who are governed by Hindu Law, the sons as heirs are entitled to the estate of their deceased father, subject to the payment of his debts. They are, therefore, entitled to

HINDU LAW—*continued.*

23. SUCCESSION—*concluded.*

take possession of their father's property, to administer it, and to pay debts without being liable to account to the Court otherwise than as heirs. *Veerasokkaraju* v. *Papiah, I L. R. 26 Mad. 792,* followed. HAJI SABOO *v.* ALLY MAHOMED (1904).

I. L. R. 30 Bom. 270

——— *Mitakshara—Succession—Right of females to inherit.*—Under the Hindu law of the Benares School females not expressly named in the Mitakshara as heirs do not inherit. The son's daughter, not being so named, is therefore not an heir to her grandfather. *Gauri Sahai* v. *Rukko, I. L. R. 3 All. 45, Jagat Narain* v. *Sheo Das, I. L. R. 5 All. 311, Ramanand* v. *Surgiani, I. L. R. 16 All. 221,* and *Koomud Chunder Roy* v. *Seetakanta Roy, W. R. Sp. number, F. B. Rulings, p. 75,* followed. *Girdhari Lall Roy* v. *The Bengal Government, 12 Moo. I. A. 445, Lakshmanammal* v. *Tiruvengada, I. L. R. 5 Mad. 241, Narasimma* v. *Mangammal, I. L. R. 13 Mad. 10,* and *Ananda Bibee* v. *Nownit Lal, I. L. R. 9 Calc. 315,* referred to. *Bansidhar* v. *Ganeshi, I. L. R. 22 All. 838, Nallanna* v. *Ponnal, I. L. R. 14 Mad. 149,* and *Ramappa Udayan* v. *Arumagath Udayan, I. L. R. 17 Mad. 182,* dissented from. NANHI *v.* GAURI SHANKAR (1906) . **I. L. R. 28 All. 187**

——— *Succession—Joint Hindu family—Lunacy.*—A member of a joint Hindu family, who has acquired by his birth an interest in the joint family property, is not divested of that interest by subsequently becoming insane. *Deo Kishen* v. *Budh Prakash, I. L. R. 5 All. 509,* followed. TIRBENI SAHAI *v.* MUHAMMAD UMAR (1905).

I. L. R. 28 All. 247

——— *Succession—Mitakshara—Right of females to inherit.*—In the case of Hindus governed by the Mitakshara law no females, except those expressly named in the Mitakshara as heirs, can inherit. A grand daughter, therefore, cannot succeed to the estate of her grandfather. *Gauri Sahai* v. *Rukko, I. L. R. 3 All. 45; Jagat Narain* v. *Sheo Das, I. L. R. 5 All. 311; Nanhi* v. *Gauri Shankar, Weekly Notes, 1905, p. 241,* and *Koomud Chunder Roy* v. *Seeta Kanth Roy, W. R. Sp. No. F. B. 75,* followed. *Bansidhar* v. *Ganesh, I. L. R. 22 All. 338, Nallanna* v. *Ponnal, I. L. R. 14 Mad. 149,* and *Ramappa Udayan* v. *Arumagath Udayan, I. L. R. 17 Mad. 182,* dissented from. JAGAN NATH *v.* CHAMPA (1905) . . **I. L. R 28 All. 307**

——— *Mitakshara—Succession—Stridhan.*—*Held,* that the stridhan of a Hindu woman governed by the Mitakshara law would, on her death without issue, go to the sons of her husband's sister in preference to the sons of her own sister. GANESHI LAL v. AJUDHIA PRASAD (1906) . **I. L. R. 28 All. 345**

24. WIDOW.

See ACT XXI OF 1850, s. 1.

I. L. R. 28 All. 233

HINDU LAW—*continued.*

24. WIDOW—*concluded.*

See WILL.

——— *Widow—Power of alienation—Power to grant permanent lease—Benefit of the estate.*—A Hindu widow, as regards the management of the estate, has not less power than the manager of an infant's estate, and the reversioners are not entitled to set aside a permanent lease granted by her, which is found to be for the benefit of the estate and by which they are found to have been benefited. *Hunoomas Persaud Panday* v. *Mussummat Babooe Munraj Koonweree, 6 M. I. A. 893,* and *Rameswar Pershad* v. *Run Bahadur Singh, I. L. R. 6 Calc. 843,* applied. DAYAMANI DEBI *v.* SRINIBASH KUNDU (1906) . . . . **I. L. R. 33 Calc. 842**

25. WILL.

——— *Will—Construction of will—Bequest of absolute interest—Defeasance—Bequest over—Contingent bequest—Hindu Wills Act (XXI of 1870), s. 2.—Succession Act (X of 1865), ss. 82, 111—Hindu Law—Adoption—Adoption by widow—Termination of authority to adopt—Vesting of estate in son's widow.*—Under s. 82 of the Succession Act, which has been made applicable to Hindus by s. 2 of the Hindu Wills Act, a bequest in the words "My adopted son shall succeed to all the properties which I have" would, in the absence of a conflicting context pass the absolute interest to the adopted son. Where there is a bequest to an adopted son and on his death and until another adoption the estate is bequeathed to the testator's widow, and no time is mentioned in the will for the happening of the death of the adopted son, who survived the period of distribution. *Held,* that, under s. 111 of the Indian Succession Act and s. 2 of the Hindu Wills Act the bequest over to the widow was invalid. *Jotendramohon Tagore* v. *Ganendramohun Tagore, L. R. Sup I. A. 47, 18 W. R. 359,* and *Narendra Nath Sircar* v. *Kamalbasini Dasi, I. L. R. 26 Calc. 563, L. R. 23 I. A. 18,* referred to. A Hindu died leaving an adopted son *A* and a widow *M* with authority to adopt three sons one after the death of another. *A* attained majority and died, leaving a widow on whose death the estate reverted to *M,* who then adopted the second defendant. *Held,* that under the Hindu Law a widow's power of adoption is limited, and that on the death of *A* leaving a widow, in whom the estate vested, the power of adoption vested in *M* came to an end and did not merely remain suspended during the lifetime of *A*'s widow and that the adoption of the second defendant was invalid. *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry, 10 Moo. I. A. 279, 3 W. R. P. C. 15, Padma Kumari Debi Chowdhrani* v. *Court of Wards, I. L. R. 8 Calc. 302, L. R. 8 I. A. 229, Thayammal* v. *Vankatarama, I. L. R. 10 Mad. 205, L. R. 14 I. A. 67, Tara Churn Chatterji* v. *Suresh Chunder Mukerji, I. L. R. 17 Calc. 123; L. R. 16 I. A. 166, Krishnarav Trimbak Hasabnis* v. *Sankarrav Vinayak Hasabnis, I. L. R. 17 Bom. 164, Venkappa-Bapu* v. *Jivaji Krishna, I. L. R. 25 Bom. 306,* and

HINDU LAW—*continued.*

25. WILL—*continued.*

Ram Krishna v. *Shamrao, I. L. R. 26 Bom. 526,* followed. *Bykant Monee Roy* v. *Kristo Soondere, 7 W. R. 392,* not followed. *Villakni Venkata Krishna Rao* v. *Venkata Rama Lakshmi, I. L. R. 1 Mad. 174; L. R. 4 I. A. 1, Kannepalli Suryanarayana* v. *Pucha Venkataramana, 10 C. W. N. 921, 4 C. L. J. 171; I. L. R. 29 Mad. 382. Ram Soondur Singh* v. *Surbanee Dossee, 22 W. R. 121,* and *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi, I. L. R. 17 Calc. 513,* referred to. MANIKYAMALA BOSE v. NANDA KUMAR BOSE (1906).

I. L. R. 33 Calc. 1306

———— *Will, construction of—Adoption—Authority to adopt declared invalid—Gift over to the daughters—Nature of interest taken by each daughter—Daughter with natural children and daughter with adopted child—Testacy or intestacy—Meaning of words "to whom and their respective sons I give devise and bequeath the same"—Words of limitation—Succession Act (X of 1865) ss. 82, 111, 116, 117.*—*A* by his will directed that on his failure to adopt, his widow *B*, executor and trustee, should adopt three sons in succession in the event of any of the adopting sons dying without male issue during the lifetime of his widow, and the son so adopted should inherit his property, but was not to obtain possession until 18 years of age, and until the death of the widow *B*, whichever event should happen last. He also provided in his will that in case of such adopted son surviving the widow and dying under 18 years of age without leaving issue, his executors should make over and divide the whole estate both real and personal between his two daughters *E* and *F* in equal shares; but should one of them die without issue, then the surviving daughter and her sons should be entitled to the share of the deceased daughter, or in case of either daughter leaving sons, the share of such daughter should be paid to her sons "share and share alike". *A* afterwards died, leaving surviving him his widow *B* and his two daughters *E* and *F*, but without adopting any son. On the 9th August 1876 *B* adopted *C*, who died unmarried on the 9th January 1881. Subsequently *B* adopted a second son *D*, on the 9th February 1881, who on the 1st August 1894 brought a suit in the High Court for construction of *A*'s will. This was finally appealed to the Privy Council, which decided on the 2nd May 1900 that the powers of adoption conferred by the will of *A* were invalid in law. On the 2nd November 1900 *E* being childless adopted a son, *G*. *B* thereafter died on the 14th August 1904, and on the 19th December 1904 *E* instituted this suit for construction of *A*'s will. *Held*, that the prior bequest of *A* had failed *ab initio* by reason of its object never having come into existence, and that such failure did not make the bequest to *E* and *F* void, but that they each took an absolute interest under the will of the testator *A* as tenants in common. *Jones* v. *Westcomb, 1 Eq. Cas. Abr. 248, Statham* v. *Bell, Cowp. 40, Meadows* v. *Parry, 1 V. & no B 124, Murray* v. *Jones, 2 V. & B 312, Mackinnon* v. *Sewell, 5 Sim. 78, Avelyn* v. *Ward, 1 Ves 420,* referred to. *Held*, also, that there was a necessary implication in favour of the daughters *E* and *F* as the testator *A* wished to give them his property on failure of adoption, and s. 116 of the Succession Act enabled the Court to effect this necessary implication. *Okhoymoney Dasee* v. *Nilmoney Mullick, I. L. R. 15 Calc. 283,* referred to. Under Hindu Law a married daughter takes by inheritance a limited estate, but under a demise by will she takes an absolute estate, unless her interest is curtailed by express words or by necessary implication. S. 82 of the Succession Act referred to. *Ramasami* v. *Papayya, I. L. R. 16 Mad. 466, Lala Ramjivan Lal* v. *Da Koer, I. L. R. 24 Calc. 406, Mussamut Kollany Koer* v. *Luchmee Pershad, 24 W. R. 395, Bhoba Tarini Debya* v. *Peary Lall Sanyal, I. L. R. 24 Calc. 646, Atul Krishna Sircar* v. *Sanyasi Charan Sircar, 9 C. W. N. 784,* referred to. *Held*, further, that the words in the will "to whom and their respective sons I give devise and bequeath the same" did not indicate that the testator intended to create an estate for life in favour of his daughters with a remainder over to their sons, and such words could not be construed as creating joint estates in favour of his daughters and their sons. The word "sons" is a word of limitation and is intended to have the same effect as the words "sons, grandsons, etc." *Held*, also, that there being no contest as to the adoption of *G* by *E* after the death of the testator, *E* attained the status of a daughter with a son. It is now settled by law that an adopted son holds precisely the same position as a son born, as regards inheritance from the adoptive mother's relations, and the status of an adopted son, unless modified by express texts, is similar to that of a son born, as regards the performance of periodical obsequial ceremonies and inheritance. *Puddo Kumari Debi* v. *Jogat Kishore Acharya, I. L. R. 5 Calc. 615, Uma Sanker Moitra* v. *Kali Kumal Mozumdar, L. R. 10 I. A. 138,* referred to. It is premature to decide whether a gift is defeasable in the event of either daughter dying without male issue. *Lalit Mohon Singh Roy* v. *Chukan Lal Roy, L. R. 24 I. A. 76,* referred to. RADHA PRASAD MULLICK v. RANEE MANI DASSEE (1906).

I. L. R. 33 Calc. 947
s.c. 10 C. W. N. 695

HINDU WILLS ACT (XXI OF 1870).

See HINDU LAW. **I. L. R. 33 Calc. 1306**

HOLDING OVER.

See ADVERSE POSSESSION.
10 C. W. N. 343

HOMESTEAD LAND.

See BENGAL TENANCY ACT, S. 182.
10 C. W. N. 944

I

IDOL.

——— **right of, to remove.**

See CIVIL PROCEDURE CODE.
10 C. W. N. 505

——— *Right of suit of worshipper—Idol, location of—Religious ceremony.*—A suit not based upon any right to the property in *idols* or to an office, but upon the plaintiff's supposed right as worshipper to insist on the observance of a ceremonial regulation relating to the particular temple in which the *idol* should be ordinarily located is not a suit of a civil nature and not maintainable in a Civil Court. LOKE NATH MISRA *v.* DASARATHI TEWARI (1902).
10 C. W. N. 505

IMMOVEABLE PROPERTY.

See HINDU LAW . **I. L. R. 33 Calc. 23**

See REGISTRATION ACT (III OF 1877), S. 17. . **I. L. R. 28 All. 277**

INCUMBRANCE.

See BENGAL TENANCY ACT, s. 167.
10 C. W. N. 976

See REVENUE SALE LAW, s. 37.
10 C. W. N. 497

INHERITANCE.

See HINDU LAW.
I. L. R. 30 Bom. 431
I. L. R. 33 Calc. 371, 1079

INJUNCTION.

See APPEAL . . **10 C. W. N. 7**

See CIVIL PROCEDURE CODE, s. 260.
10 C. W. N. 297

See DECREE . **I. L. R. 33 Calc. 306**

See DISTRICT MUNICIPAL ACT.
I. L. R. 30 Bom. 409

See HINDU LAW . **I. L. R. 33 Calc. 1119**

See LEASE . **I. L. R. 33 Calc. 203**

See MORTGAGE . **I. L. R. 33 Calc. 689**

——— *Temporary injunction—Mining operations commenced by defendant under bonâ fide claim of title—Loss to plaintiff from non-cultivation—Balance of convenience—Standing by—Principles on which temporary injunction should be granted.*—The Defendant Company acting under a *bonâ fide* claim of right began to cut an incline and sink a pit for the purpose of working the minerals in certain lands and had already finished constructing a railway siding when the plaintiffs sued for a declaration of their under-ground rights in the said lands and for a permanent injunction restraining the Defendant Company from interfering with the same. They also applied for a temporary injunction pending the hearing of the suit restraining the Defendant Company from proceeding with the boring operations on the allegation that the lands were being rendered unfit for cultivation thereby. The Court of first instance granted a temporary injunction mainly on the ground that the object of the suit would be frustrated, if the Defendant Company were allowed materially to alter the features of the locality. *Held*, that in making this order the Court had overlooked certain material considerations. The balance of convenience in this case was in favour of the Defendant Company being allowed to continue the mining operations. The loss caused to the Company by stoppage would be out of all proportion to the loss apprehended by the plaintiffs, specially as the plaintiffs (of whose title there was no evidence) would, if successful, be able to recover damages from the Company, which was a substantial one and which did not enter as a mere wanton trespasser. Moreover, it appeared that the plaintiffs stood by for a considerable time whilst the Defendant Company was spending a large amount of money over the works sought to be stopped. This is a circumstance of considerable importance in dealing with an application for injunction, especially in the case of a mining Company. SINGARAN COAL SYNDICATE *v.* INDRA NATH CHATTERJEE (1906).
10 C. W. N. 173

INJUNCTION, MANDATORY.

——— *Discretion of Court—Landlord cannot have mandatory injunction in respect of building, if, knowing of the obstruction, he does not object.*—Where the tenant of an agricultural holding constructs a building of a character not suitable to such holding, with the knowledge of the landlord, such landlord is bound not only to object, but to take legal steps to stop the progress of the work; and, in default of doing so, the landlord is not entitled to a mandatory injunction for the demolition of the building. The same principle will apply where the party building is not the tenant, but one who does so under agreement with the owner of the kudivaram right. *Benode Coomaree Dossee* v. *Soudaminey Dossee, I. L. R. 16 Calc. 252*, followed. *Sankaralingam Chettiar* v. *Stephen Augustus Ralli, S. A. No. 959 of 1901* (*unreported*), followed. ULAGAPPAN AMBALAM *v.* CHIDAMBRAM CHETTY (1906) . . **I. L. R. 29 Mad. 497**

INSOLVENCY.

See INTEREST . . **10 C. W. N. 884**

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179 . **I. L. R. 28 All. 387**

INSOLVENCY ACT (11 AND 12 VICT., C. 21).

——— s. 31—*Sale by Official Assignee—Sanction of the Court—Power of Court to set aside a completed sale.*—Under the Indian Insolvent

INSOLVENCY ACT (11 AND 12 VICT., C. 21) —*concluded.*

Act the Official Assignee has full power to sell the property and effects of an insolvent, and it is his duty to make a sale of the same with all convenient speed. The sanction of the Court to the sale is not necessary. S. 31 of the Indian Insolvent Act does not vest the Court with power to set aside a completed sale. WOONWALLA v. MACLEOD (1906). **I. L. R. 30 Bom. 515**

——— *Proceedings "in aid of"—English Court—Public examination—Procedure.*—Where some of the partners of a firm had filed their petition in insolvency in Calcutta and others had been adjudicated bankrupt in England, and in the insolvency proceedings in Calcutta an order had been made that such proceedings should be "in aid of and auxiliary to" the bankruptcy proceedings. *Held*, that the Trustee in Bankruptcy and Official Receiver had no *locus standi* to oppose the personal discharge of the insolvents, who had filed their petition in the Calcutta Court. Procedure in holding a public examination in India under such order in aid. SHRAGER, IN THE MATTER OF (1906). **I. L. R. 33 Calc. 1062**

——— *Order of Insolvent Court—Suit—Special and ordinary jurisdiction of High Court in insolvency—Limitation Act (XV of 1877), Sch. II, Art. 122.*—The High Court exercises the powers of an Insolvent Court under a special jurisdiction vested in it by the Insolvency Act, and though this jurisdiction is a special one, the High Court exercises it as part of the ordinary jurisdiction vested by law, *Canaas Narrondas* v. *C. A. Turner, I. L. R. 13 Bom. 520*, followed. An order of the Insolvency Court is a judgment of the High Court and a suit based upon such judgment is maintainable. *Attormoney Dossee* v. *Hurry Doss Dutt, I. L. R. 7 Calc. 74*, followed. ANNODA PRASAD BANERJEE v. NOBO KISHORE RAY (1905). **I. L. R. 33 Calc. 560**

INSPECTION.

See JUDGE . **I. L. R. 33 Calc. 133**

INTENTION.

See PENAL CODE, S. 292.

INTEREST.

See ABWAB . **I. L. R. 33 Calc. 683**

See CONTRACT ACT (IX OF 1872), S. 74. **10 C. W. N. 1020**

See DAMDUPAT.

See DISQUALIFIED PROPRIETOR. **10 C. W. N. 849**

See HINDU LAW . **I. L. R. 30 Bom. 452**

See MESNE PROFITS. **I. L. R. 33 Calc. 329**

See MORTGAGE . **I. L. R. 33 Calc. 590** **10 C. W. N. 266**

INTEREST—*concluded.*

See PRACTICE.

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 86 AND 88.

——— *Mortgage decree—Construction of decree—Date of realization.*—A mortgagee, who has obtained a decree for sale awarding interest up to the date of realization, is entitled to interest upon his mortgage-money up to the date of the confirmation of the sale. *Manilal Umedram* v. *Nanabhai Maneklal, I. L. R. 28 Bom. 264*, referred to. MEGRAJ MARWARI v. NURSING MOHAN THAKUR (1906) . . . **I. L. R. 33 Calc. 846**

——— *Civil Procedure Code (Act XIV of 1882), ss. 351 and 352—Rule of Damdupat, when applicable—Damdupat if applicable in insolvency proceedings—Practice.*—The rule of *damdupat* exists only so long as the contractual relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree. Proof of a claim in insolvency amounts to a decree and the rule of *damdupat* would not apply to a claim so proved. Moreover, the uniform practice of this Court has been not to apply the rule of *damdupat* in insolvency proceedings. HARI LALL MALLICK, IN RE (1906) **10 C. W. N. 884** s.c. **I. L. R. 33 Calc. 1269**

INTESTATES ACT.

See LIMITATION . **10 C. W. N. 354**

INVENTIONS AND DESIGNS ACT (V OF 1888).

——— **s. 30.**

See BURDEN OF PROOF. **10 C. W. N. 985**

——— **s. 30**—*Rule issued under s. 30 on respondent—Respondent shewing cause by affidavits—Issue directed to be tried—Onus of proof at trial.*—The applicant obtained a rule under s. 30 of the Inventions and Designs Act, calling upon the respondent to show cause that he had not acquired an exclusive privilege in a certain invention. The respondent showed cause against the rule by affidavits, but the Court instead of discharging the rule, directed the issue to be tried. *Held* at the trial, the onus of proof lay on the respondent. ALEXANDER GRAY, IN RE (1906) . . **10 C. W. N. 985**

IRREGULARITY.

See CIVIL PROCEDURE CODE, SS. 306 AND 311.

J

JALKAR.

——— *Fishery, right of—Dobas—Change in course of river—Open Channels—Interference*

JALKAR—*concluded.*

with right—Decree, form of.—If a river shifts its course leaving lakes, *dobas* or sheets of water in its old bed, the grantee of the exclusive right of fishery in the river retains that right over such lakes and *dobas* so long as these latter remain in communication with the main channel at all seasons of the year. On proof of the existence of such communication and on proof that the defendant has prevented the grantee from exercising his right of fishery in such *doba*, the latter would be entitled to a decree for recovery of possession without any reference to what may or may not be the rights of the parties, if the communication should cease in future. *J. J. Grey* v. *Anund Mohan Moitro, W. R. 1864, 108; Krishnendro Roy Chowdhry* v. *Surno Moyee, 21 W. R. 27,* and *Tarini Charan Sinha* v. *Watson & Co., I. L. R. 17 Calc. 968,* referred to. BHABA PRASAD *v.* JAGADINDRA NATH RAI (1905) . . . **I. L. R. 33 Calc. 15**

JALKAR RIGHTS.

See FISHERY, RIGHT OF.
10 C. W. N. 1349

JOINDER OF CAUSES OF ACTION.

——— *Civil Procedure Code (Act XIV of 1882), s. 45—Suit—Agricultural holding—Fishery—Bengal Tenancy Act (Act VIII of 1885), s. 193—Civil Court.*—A suit for a consolidated amount contracted to be paid the defendants on account of a fishery, which they claimed as a right appurtenant to the holding, is, by virtue of s. 45 of the Civil Procedure Code, maintainable. A suit for the rent of a fishery is entertainable in ordinary Civil Courts, which have jurisdiction in rent suits. SHIB PROSAD CHAUDHURI *v.* VAKAI PALI (1906).
I. L. R. 33 Calc. 601

JOINDER OF CHARGES.

See CRIMINAL PROCEDURE CODE.
I. L. R. 30 Bom. 49

JOINDER OF PARTIES.

See BENGAL TENANCY ACT.
10 C. W. N. 216

JOINT HINDU FAMILY.

See CIVIL PROCEDURE CODE, s. 13.

See HINDU LAW.

JOINT POSSESSION.

See CO-SHARERS.
I. L. R. 33 Calc. 1201

JOINT PROPERTY.

See CO-SHARERS.
I. L. R. 33 Calc. 1201

——— *Exclusive dealing with joint property by one of the co-owners—Remedy of the other co-owners—Form of decree.*—On the death of a tenant of land, which belonged to several joint owners, one of the co-owners obtained exclusive possession of the tenant's holding and had his name recorded in the mutation department as owner. The other co-owners sued for joint possession to the extent of their interest in the land, and they asked also for interest *pendente lite* and future interest and costs of suit and for no further relief. *Held,* that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land, and that the plaintiffs were, as such joint owners, entitled to an account of the profits of the land. But the plaintiffs were not entitled to an injunction restraining the defendant from dealing with the land without the plaintiffs' consent. *Bhola Nath* v. *Buskin, Weekly Notes, 1894, p. 127, Ram Jatan Shukul* v. *Jaisar Shukul, Weekly Notes, 1894, p.166, Rahman Chaudhri* v. *Salamat Chaudhri, Weekly Notes, 1891, p. 48, Jagar Nath Sing* v. *Jai Nath Singh, I. L. R. 27 All., 88, Ram Sarup* v. *Gulzar Banu, Weekly Notes, 1905, p. 160,* and *Watson & Co.* v. *Ramchand Dutt, I. L. R. 18 Calc. 10,* referred to. *Nanhi Devi* v. *Daulat Singh, Weekly Notes, 1905, p. 119,* in part overruled. PHANI SINGH *v.* NAWAB SINGH (1905) . . . **I. L. R. 28 All. 161**

JOINT TENANCY.

See CONSTRUCTION OF DOCUMENT.

JOINT TRIAL.

See CRIMINAL PROCEDURE CODE.
I. L. R. 30 Bom. 49

See RES JUDICATA.
I. L. R. 33 Calc. 1101

——— *Criminal Procedure Code (Act V of 1898), ss. 239 and 537—Separate retainer of stolen properties—Offences committed in the same transaction—Charge.—Per* HARINGTON and STEPHEN, *JJ.* (BRETT, *J.*, dissenting).—Different persons charged with separately retaining different articles of stolen properties, which are proceeds of the same theft, cannot be tried together, as the offences charged cannot be said to have been committed in the same transaction. Such joint trial is illegal and is not saved by the operation of s. 537 of the Criminal Procedure Code *Subrahmania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61, 5 C. W. N. 866,* followed. *In re A. David, 5 C. L. R. 574,* and *Bishnu Banwar* v. *Empress, 1 C. W. N. 85,* referred to. ABDUL MAJID *v.* EMPEROR (1906).
I. L. R. 33 Calc. 1256

——— *Offences of the same kind by the same persons on different dates—Separate transactions—Misjoinder of persons—Criminal Procedure Code (Act V of 1898), ss. 233, 234 and 239.*—The petitioners and others entered upon a plot of land belonging to the complainant on the 22nd February and looted his linseed crop, and on the next day the same persons entered upon another plot and looted his tobacco. They were tried jointly, under the

JOINT TRIAL—*concluded.*

summary procedure, and convicted under ss. 143, 379 of the Penal Code in respect of each occurrence. *Held*, that the events of the two different dates were not parts of the same transaction, and that the trial was bad for misjoinder under s. 239 of the Criminal Procedure Code. S. 234 by its terms refers to the case of a single accused, and is not applicable, where several persons are tried jointly under s. 239. BUDHAI SHEIK *v.* EMPEROR (1905).

I. L. R. 33 Calc. 292

JUDGE.

See SANCTION TO PROSECUTE.

I. L. R. 33 Calc. 1393

——— *Inspection—Local inspection without notice to parties.*—A Judge with a view to a better understanding of the evidence in a case and to clear up some doubtful points, made a local inspection without giving any notice to the parties. The result of the investigation he did not place upon the record, but he did so in his judgment. *Held*, that a Judge is at liberty himself to inspect the property in dispute and inform himself by the observation of his senses of matters which may help in understanding the evidence and in deciding the case, especially such matters which do not require scientific knowledge. *Joy Coomar v. Bundhoo Lal*, *I. L. R. 9 Calc. 863*, and *Dwarkanath Sardar v. Prosunno Kumar Hajra*, *1 C. W. N. 682*, referred to, *Held*, also, that there is no law, which requires a Judge to give notice to the parties or to give them an opportunity of being heard either during or after the inspection. It is generally desirable that a Judge should place upon record the result of his investigation. MOHAN *v.* BHAGBAT LAL SAHA (1905).

I. L. R. 33 Calc. 133

JUDGMENT.

See APPEAL . I. L. R. 33 Calc. 1323

See AWARD . I. L. R. 33 Calc. 789

See LETTERS PATENT, CL. 15.

10 C. W. N. 986

See LIMITATION ACT, S. 19.

10 C. W. N. 874

JUDGMENT-DEBTOR.

See CIVIL PROCEDURE CODE, S. 244.

10 C. W. N. 240

JUDICIAL OFFICERS ON TOUR.

See JUDICIAL OFFICERS' PROTECTION ACT (XVIII OF 1850).

JUDICIAL OFFICERS' PROTECTION ACT (XVIII OF 1850).

——— *Civil Procedure Code (Act XIV of 1882), s. 199—Suit against a Magistrate to recover damages—Judgment written by a Judge after his transfer—Proceedings before a Magistrate for arrears of Municipal revenue—Jurisdiction—Protection afforded to judicial officers—Public policy—Judicial officers on tour.*—To secure protection

JUDICIAL OFFICERS' PROTECTION ACT (XVIII OF 1850)—*concluded.*

under the Judicial Officers' Protection Act (XVIII of 1850) the defendant must show that, 1st, the act complained of was done, or ordered by him in the discharge of his judicial duty; and, 2nd, that it was within the limits of his jurisdiction, or if not within those limits, that he, at the time, in good faith believed himself to have jurisdiction to do and order the acts complained of. In a suit against a Magistrate to recover damages for injury to the plaintiff on account of the highly arbitrary, spiteful and illegal conduct of the defendant—the conduct being in the course of proceedings instituted by a Municipality against the plaintiff before the defendant as Magistrate for the recovery of arrears of house tax—the plaintiff contended that the defendant had no jurisdiction to entertain the proceedings because the arrears were paid before the proceedings were commenced. *Held*, that the case was one which the Magistrate was competent to entertain and none the less because in the result it might appear that there was nothing due. Jurisdiction for the purpose in hand rested, not on the proof adduced in support of the charge, but on the nature of the charge actually made. The protection afforded to judicial officers rests on public policy. And although thereby a malicious Judge or Magistrate may gain a protection designed not for him, but in the public interest, it does not follow that he can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded. Judicial officers, whose official movements may leave them open to the charge that they wilfully compel parties, who appear before them, to follow the movements of their camp, should strive to exercise their powers with such consideration for such parties as will secure them from any imputation of misconduct in this respect. GIRJASHANKAR *v.* GOPALJI (1905).

I. L. R. 30 Bom. 241

JUDICIAL PROCEEDING.

See CAUSE OF ACTION . 10 C. W. N. 107

See CRIMINAL PROCEDURE CODE.

JULKUR.

——— **in non-tidal and non-navigable river.**

See FISHERY . . 10 C. W. N. 540

JURISDICTION.

See APPEAL . I. L. R. 33 Calc. 1323

See ARBITRATION.

I. L. R. 29 Mad. 69

See BENGAL UPPER PROVINCES AND ASSAM CIVIL COURTS ACT (XII OF 1887), SS. 15, 17, 18 AND 19.

See CIVIL PROCEDURE CODE.

I. L. R. 30 Bom. 570, 625
10 C. W. N. 12

See COMPANIES ACT, S. 58.

10 C. W. N. 906

JURISDICTION—*continued.*

See CONTRACT ACT (IX OF 1872), s. 69.

See COPYRIGHT ACT, s. 6.

10 C. W. N. 134

See CRIMINAL PROCEDURE CODE.

See LETTERS PATENT.

I. L. R. 30 Bom. 167

See PENAL CODE, s. 292.

See POSSESSION.

See PRACTICE.

See SMALL CAUSE COURT ACT.

See TRANSFER OF SUIT.

——— *Non-resident foreigner—Subjects of protected Native States may be sued, if cause of action arises within the jurisdiction.*—A non-resident foreigner, who is a subject of a protected Native State, may be sued in the Courts of British India, if the cause of action arose within the jurisdiction of any such Court. Even apart from the provisions of s. 17 of the Code of Civil Procedure, the cause of action in the case of contracts arises at the place of performance. *Annamalai Chetty* v. *Murugesa Chetty, I. L. R. 26 Mad. 544,* followed. TADEPALLI SUBBA RAO *v.* MIR GULAM ALLIKHAN OF BANGANAPALLI. (1905).

I. L. R. 29 Mad. 69

——— *Security for good behaviour—District Magistrate, power of.*—A District Magistrate ha no power under the law to order a 'further' inquiry in a proceeding under s. 110 of the Code of Criminal Procedure after setting aside, on appeal, an order passed by a Subordinate Magistrate directing the accused to furnish security for good behaviour. DAYANATH TALUQDAR *v.* EMPEROR (1905).

I. L. R. 33 Calc. 578

——— *Suit against a Magistrate to recover damages—Proceedings before a Magistrate for arrears of Municipal revenue—Protection afforded to Judicial officers—Public policy—Judicial Officers' Protection Act (XVIII of 1850).*—In a suit against a Magistrate to recover damages for injury to the plaintiff on account of the highly arbitrary, spiteful and illegal conduct of the defendant—the conduct being in the course of proceedings instituted by a Municipality against the plaintiff before the defendant as Magistrate for the recovery of arrears of house-tax—the plaintiff contended that the defendant had no jurisdiction to entertain the proceedings, because the arrears were paid before the proceedings were commenced. *Held,* that the case was one which the Magistrate was competent to entertain and none the less because in the result it might appear that there was nothing due. Jurisdiction for the purpose in hand rested, not on the proof adduced in support of the charge, but on the nature of the charge actually made. GIRJASHANKAR *v.* GOPALJI (1905).

I. L. R. 30 Bom. 241

——— *Suit for specific performance—Specific performance of agreement to grant lease—Land partly within jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 16, cl. (d)—Chota Nagpur Encumbered Estates Acts (VI of 1876, V of 1884), s. 3 "Liabilities," meaning of—Effect of order under s. 2 on pending appeal—Specific performance of contract—Contract—Disability to contract—Effect of contract being embodied in decree—Chota Nagpur Encumbered Estates Act (VI of 1876), s. 3, sub-s. 3, cls. (a) and (c), s. 23—Invalidity of contract—Perpetuities.*—In a suit by *A* against *S* for establishment of his title to the Dhalbhoom Raj, which was at that time under the management of Government under the Chota Nagpur Encumbered Estates Act, *S,* who was then actually and rightfully in possession of the Raj, entered into a compromise with *A* by which, on the latter recognising his title to the Raj, *S* agreed that he would, within three months after the Raj was released, execute in favour of *A* a putni lease of a compact portion of the Raj yielding a certain income. The suit was decreed according to the terms of the compromise; the manager under the Act was no party to the compromise or to the decree. After the release of the Raj the heir of *A* sued *S* for specific performance of the agreement to grant the lease and for possession with damages and mesne profits of the land covered by the lease or in the alternative for compensation. *Held* that, under s. 16, cl. (*d*) of the Civil Procedure Code, a Court within the local limits of whose jurisdiction a portion of the land, which might be covered by the lease, was situated, was competent to try the suit. *Land Mortgage Bank* v. *Sudurudeen Ahmed, I. L. R. 19 Calc. 358, Sreenath Roy* v. *Cally Doss Ghose, I. L. R. 5 Calc. 82, Kellie* v. *Fraser, I. L. R. 2 Calc. 445,* and *Delhi and London Bank* v. *Wordie, I. L. R. 1 Calc. 249,* referred to. *Held,* that the agreement was a liability and the appeal to the High Court was barred by the provisions of s. 3 of the Chota Nagpur Encumbered Estates Act by reason of the fact that pending the appeal the estate had again been taken charge of by the Government under the Act. *Kameshar Prasad* v. *Bhikhan Narain Singh, I. L. R. 20 Calc. 609,* followed. *Held* that, under s. 3, sub-s. 3, cls. (*a*) and (*c*) of the Chota Nagpur Encumbered Estates Act, *S* was, at the time the agreement was made, rendered incompetent to enter into the agreement; that the agreement was not a matter involving any question of succession within the meaning of s. 23 of the Act; and the manager, although originally made a party, having ceased to be a party to *A's* suit at the time the compromise was filed, it could not acquire any binding effect by reason of its being included in the decree. *Held,* further, that the agreement was indefinite in its terms and having never since been definitely expressed or concluded was incapable of specific performance, and that it was also bad as infringing the law of perpetuities, inasmuch as, having regard to the amending Act V of 1884, the Dhalbhoom Raj might not have been released within the period limited by the law. *Chandi Charan Burua* v. *Sidheswari Debi, I. L. R. 16 Calc. 71,* relied on. JAGADIS CHANDRA DEO DHABAL *v.* SATRUGHAN DEO DHABAL (1906).

L. R. 33 Calc. 1065

JURISDICTION—*continued.*

——— *Jurisdiction of High Court—Original Side of High Court—Suit for administration of the estate and to set aside decree on the ground of fraud—Decree of Mofussil Court—Leases of land outside jurisdiction—Executor defendant residing in Calcutta—Construction of Hindu will—Expenses of poojas, etc.—Discretion of executors—Void bequest—Directions as to accumulations.*—The plaintiff brought a suit on the original side of the High Court at Calcutta for administration of the estate of her husband, who had been a resident of Calcutta and for the construction of his will; and she also prayed that a deed of trust, an award, and two leases of land outside the jurisdiction of the Court, all of which documents dealing with her husband's estate she alleged she had been induced to sign by the fraud of one of his executors, the principal defendant, who resides in Calcutta, and a decree of the Subordinate Judge of Alipur filing the award and giving judgment in accordance therewith, might be declared void by reason of fraud. She obtained leave to file the suit on the ground that the cause of action arose partly outside the jurisdiction of the Court. Both Courts below held that the fraud was proved. *Held*, by the Judicial Committee, that the High Court on its Original Side had jurisdiction to entertain the suit. That Court had power to order administration of the estate, and as auxiliary to such order to set aside deeds obtained by the fraud of the executor. The fact that a decree had been granted by a mofussil Court making a fraudulent award an order of Court did not protect that decree from the jurisdiction of the High Court, when redressing the fraud. The High Court was also entitled, for the due administration of the estate, to set aside leases of land outside the territorial limits of its jurisdiction, those leases having been made as an incident of the same fraud. By his will the testator gave one-third of his estate to each of his two brothers, and as to the remaining third gave the following direction to his executors. "And you are to pay my share of the expenses whatever that be that shall be incurred in the performance of ceremonies at the house of my maternal grandfather . . . . and for the poojas, etc., that shall be performed by my brothers in our own house you shall give my share of the expenses." *Held*, that this did not give an unlimited discretion to the executors as to the amount of the payment, and that by the decree an enquiry was rightly directed to determine what was a reasonable and proper sum for such expenses "having regard to the terms of the will and all the circumstances of the case." The ultimate disposal of the residuary third was that after all payments directed by the will whatever sum should remain was to be used in the purchase of Company's papers, "and you shall pay the interest thereof to my wife for her life, and after her death you are to make over all the property of mine and Company's paper, etc., which you shall have in your possession to them who shall be my heirs. *Held*, that if the word heirs meant the persons, who would be heirs at the widow's death, the gift was void and the result was an intestacy. If, on the other hand, the word meant the testator's right heir (as their Lordships thought it might), that was the widow herself, who therefore, in any case, was entitled to the residue for a widow's estate, and being solely entitled to the fund directed to be accumulated she could release the direction for accumulations and enjoy the whole income. BENODE BEHARI BOSE *v.* NISTARINI DASSI (1905). I. L. R. 33 Calc. 180

JURISDICTION—*concluded.*

JUST CAUSE.

See CRIMINAL PROCEDURE CODE, SS. 4 AND 476.

See PROBATE AND ADMINISTRATION ACT, S. 50 . . . 10 C. W. N. 955

K

KABULIYAT.

See RENT . . I. L. R. 33 Calc. 140

KARNAVAN.

See MALABAR LAW.

KATHIAWAR STATES, WHETHER BRITISH TERRITORY.

See NATIVE STATES . 10 C. W. N. 361

KHORPOSH GRANT.

——— *Temporary disability of such grantee to contract, his estate being subject to the provisions of Chutia Nagpur Encumbered Estates Act (VI of 1876)—Ratification, effect of.*—*A* granted a *khorposh* lease, when he was under legal disability, his estate being subject to the provisions of the Chutia Nagpur Encumbered Estates Act (VI of 1876). Subsequently, when his disability ceased, he ratified the lease. *Held*, that it was quite competent for a person emerging from a state of disability to take up and carry on the transaction commenced, while he was under disability, and *A* having subsequently ratified the lease, it was a perfectly good lease and was binding on him. *Gregson* v. *Udoy Aditya Deb*, I. L. R. 17 Calc. 223 : L. R. 16 I. A. 221, followed. ROY *v.* RAM JIWAN SINGH (1905) . . . . I. L. R. 33 Calc. 363 s.c. 10 C. W. N. 149

KHORPOSH LEASE.

See KHORPOSH GRANT.

KHOT.

See KHOTI ACT . I. L. R. 30 Bom. 290

KHOTI ACT (BOMBAY ACT I OF 1880).

——— ss. 6, 7, 8, 9, 11—*Khot—Occupancy tenant—Mortgage by occupancy tenant—Forfeiture.*—There is no authority for saying that an occupancy tenant, whose tenancy is not determined, forfeits his tenancy by parting temporarily with the possession of his land to another without resigning the land as completely as would be necessary, in the case of privileged occupants of another sub-class, to place the land at the disposal of the khot. And so long as his tenancy is not determined, the land is not at the disposal of the khot. And the khot cannot claim to treat the person in possession, under a right derived from the occupancy tenant, either as a trespasser or even as a yearly tenant, so long as the privileged occupant's rights remain undetermined by resignation, lapse or duly certified forfeiture. YESA BIN RAMA *v.* SAKHARAM GOPAL (1905).
I. L. R. 30 Bom. 290

KUTCHI MEMONS.

See CUTCHI MEMONS.

L

LABHAM.

See PROBATE AND ADMINISTRATION ACT (V OF 1881).

LACHES.

See SPECIFIC PERFORMANCE.
I. L. R. 33 Calc. 633

LAKHIRAJ LAND.

See LANDLORD AND TENANT.
10 C. W. N. 434

LAND ACQUISITION ACT (X OF 1870).

See PORT COMMISSIONERS ACT (BENGAL ACT V OF 1870), ss. 5, 6, 31, 38, 39.
I. L. R. 33 Calc. 1243

LAND ACQUISITION ACT (I OF 1894).

See CALCUTTA MUNICIPAL ACT, s. 557.
10 C. W. N. 289

See CIVIL PROCEDURE CODE, s. 102.
10 C. W. N. 991

——— s. 3, cl. (v)—*Market value of land—Collector—Calcutta Municipal Act (Bengal Act III of 1899), s. 557—Land—District—Re-assessment.*—The object of s. 557, cl. (*a*) of the Calcutta Municipal Act, is merely to give an extended definition of the term "Collector," which is defined in s. 3, cl. (*c*) of the Land Acquisition Act, or in other words, in the event of an acquisition of land or buildings by the Calcutta Municipal authorities, it is open to, but not obligatory upon, the Chairman of the Corporation to perform the duties of the Collector. But whether the Chairman of the Corporation or any of the other persons mentioned in s. 3, cl. (*c*) of Act I of 1894, acts as the Collector, the acquisition must take place under the Land Acquisition Act. The performance by the Chairman of the Corporation of the duties of a Collector under s. 557, cl. (*a*) of the Calcutta Municipal Act is not a condition precedent to the applicability of the provisions of the other clauses of the section. The term "land," as used in s. 557, cl. (*d*), includes *bustee* lands. The term "district," as used in the proviso to s. 557, cl. (*d*), is equivalent to the term "ward" under the old Municipal Act, II of 1888. The term "re-assessment" in s. 557, cl. (*d*), signifies "revaluation" and not the re-imposition of "rate" or "tax." Where a substantial part of the act of assessment or valuation was completed before the commencement of the Act, it cannot be maintained that there was a re-assessment after the commencement of the Act, because some objections to the re-assessment or re-valuation might have been preferred or disposed of after that date, although the re-assessment came into force on the day of the commencement of the Act. *Corporation of Calcutta* v. *Bhupati Roy Chowdhry, I. L. R. 26 Calc. 74*, referred to. SECRETARY OF STATE FOR INDIA *v.* BELCHAMBERS (1905).
I. L. R. 33 Calc. 396
s.c. 10 C. W. N. 289

——— ss. 12, 18—*Notice by the Collector—Reference to Court—Construction of statute—Meaning of word "immediately".*—The provisions of the Land Acquisition Act for the compulsory acquirement of private property are made for the public benefit, and, in the case of such Acts, "if upon words or expressions at all ambiguous it would seem that the balance of hardship or inconvenience would be strongly against the public on the one construction or strongly against a private person on another construction, it is consistent with all sound principles to pay regard to that balance of inconvenience." *Dixon's case, 5 App. Cas. 842*, followed. The word "notice" as used in cl. (*b*) of the proviso to s. 18 of the Land Acquisition Act, I of 1894, means notice whether immediate or not. The clause in question prescribes one of two periods of limitation for a party, who has not accepted the Collector's award, *viz.*, either six weeks from the date of the receipt of the Collector's notice, whether immediate or not, or six months from the date of the award: *whichever period shall first expire.* Where a statute or written contract provides that a certain thing shall be done "immediately", regard must be had, in construing that word, to the object of the statute or contract as the case may be, to the position of the parties, and to the purpose for which the Legislature or the parties to the contract intend that it shall be done immediately. The conditions prescribed by s. 18 of the Act are the conditions to which the power of the Collector to make the reference is

LAND ACQUISITION ACT (I OF 1894) —*continued.*

subject, and these conditions must be fulfilled before the Court can have jurisdiction to entertain the reference. *Dixon* v. *Caledonian Railway Co., 5 App. Cas. 827*, referred to. *Christie* v. *Richardson, 10 M. & W. 688, Raleigh* v. *Atkinson, 6 M. & W. 677*, and *In re the application of Sheshamma, I. L. R. 12 Bom. 276*, followed. IN RE NANU KOTHARE (1905) . . . **I. L. R. 30 Bom. 275**

——— **ss. 12, 18, 31, 53**—*Civil Procedure Code, ss. 102, 103—Apportionment—Reference to Court—Dismissal for default—Fresh suit, if maintainable—Rights of persons, not parties to the reference—Construction of Statute—Special jurisdiction.*—Certain persons, who were parties in a land acquisition proceeding, being dissatisfied with the apportionment of the compensation money made by the collectory, obtained a reference to the Court under s. 18 of the Land Acquisition Act, but as they did not appear at the hearing of the same it was struck off. *Held*, that a suit instituted by the same persons in the Civil Court for the apportionment of the compensation money was barred by ss. 102 and 103, Civil Procedure Code, which apply to proceedings before the Court to which a reference is made under s. 18 of the Land Acquisition Act, owing to the operation of s. 647, Civil Procedure Code, which is made applicable to such proceedings by s. 53 of the Land Acquisition Act. Persons, who were not parties in the land acquisition proceeding, were not debarred from instituting a suit for apportionment in the Civil Court. STEPHEN, *J.*—*Quære*—Whether persons, who were before the Collector, but not before the Court to which a reference was made under s. 18, Land Acquisition Act, would be debarred from instituting such a suit. MUKERJEE, *J.*—An objection, as to the measurement of the land or the amount of the compensation payable therefor, must be determined exclusively by a reference to the Civil Court under s. 18, cl. (1) of the Land Acquisition Act. But a question as to the persons to whom compensation is payable or its apportionment among the persons interested may be determined either under a reference as contemplated by s. 18, cl. (1) of the Act or by suit at the instance of persons lawfully entitled to it as against another, who has drawn the compensation money. When, however, a party has once availed himself of a reference to the Court under s. 18, Land Acquisition Act, he cannot again ask for an opportunity to litigate the same matter in the ordinary Court. *Sri Punnabati Dai* v. *Padmanand Singh, 7 C. W. N. 533; Raja Nilmoni Singh* v. *Ram Bandhu Rai, I. L. R. 7 Calc. 288 at p. 393; Hurmut Jan Bibi* v. *Padma Lochun, I. L. R. 12 Calc. 33*, referred to. BHANDI SINGH *v.* RAMADHIN ROY (1905) . . **10 C. W. N. 991**

——— **s. 18 (2).**—*Reference by Collector—Grounds of objection—Additional grounds urged before Court—Issues.*—S. 18, sub-s. 2 of the Land Acquisition Act requires that any person interested who has not accepted the Collector's award and requires the Collector to make a reference to the Court "shall state the grounds on which objection to the award is taken." Such requirement is one of the conditions precedent to the obligation of the Collector to make the reference. *Held*, that as s. 147 of the Civil Procedure Code applied the claimant at the hearing is not confined to the grounds set out in his notice. *Held*, further, that he is entitled to advance claims in respect of portions of the land taken up not referred to in his notice. IN RE RUSTOMJI JIJIBHAI (1905).

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LAND ACQUISITION ACT (I OF 1894) *continued.*

——— **s. 18**—*Award—Reference—Locus standi to ask for reference on the ground of insufficiency of amount awarded—Interest in land, if necessary—Person interested—Decision of Collector, power of Court of reference to question—Interlocutory order—Appeal.*—Some land in which one *B* owned a *mourasi mukurrari* tenant's interest was acquired by Government. Previous to the declaration of the acquisition, one *G* had entered into a contract with *B*. Notice of the acquisition under s. 9 of the Act was served, amongst others, on *G*. *G* alone appeared before the Collector and, on the award being made, applied for a reference under s. 18 on the ground that the amount awarded was insufficient. The Collector made the order asked for. Up till the date of the declaration no conveyance of *B*'s interest in the land had passed in favour of *G*. But some time after the award and the order of reference, *B* purported to convey all the interest he could claim on account of the land to *G*. The Land Acquisition Judge held that under the circumstances *G* had no *locus standi* to contest the sufficiency of the award. *Held*, that no question of apportionment having arisen, the question whether *G* had an interest such as would entitle him to any portion of the compensation money was a matter foreign to the proceeding at that stage. The fact that *G* had claimed an interest in the compensation money and the Collector had thought that he was a person, who could come in as claiming an interest, was sufficient to entitle him to ask for a reference and to appear in support of it. The order of the Land Acquisition Judge deciding that *G* had no *locus standi* to contest the sufficiency of the award was passed on a petition of objection preferred on behalf of the Government. But the final order confirming the award was made on a subsequent date. Both orders having been appealed against,—*Held*, that no appeal against the previous order was necessary, nor did an appeal lie from an interlocutory order of its nature. GALSTAUN *v.* SECRETARY OF STATE FOR INDIA (1905) . **10 C. W. N. 195**

——— **ss. 23, cls. 3 and 4, and 48**—*Acquisition of portion rendering remainder useless—Compensation—Injurious affection—Severance—Homestead land—"House."*—Where a portion of a holding used for residential purposes was acquired by Government, and it was found that the remaining portion was thereby rendered useless for such purposes,—*Held*, that it was of very little importance whether the whole holding formed a "house" within s. 49 of the Land Acquisition Act, so as to render it

LAND ACQUISITION ACT (I OF 1894) —*concluded.*

obligatory on Government to acquire the whole of it, inasmuch as compensation to the extent of the value of the entire holding would have to be paid owing to damages caused by severance and to the property being injuriously affected by the acquisition. SARAT CHANDRA BOSE *v.* SECRETARY OF STATE FOR INDIA (1904) . . . **10 C. W. N. 250**

——— *Parties bound by decision as to right to claim compensation—Res judicata.*—An adjudication as to the right of persons claiming compensation under the Land Acquisition Act (I of 1894) concludes the question between the same parties in subsequent proceedings. *Mohadevi* v. *Neelamani, I. L. R. 20 Mad. 269,* distinguished. CHOWAKARAN MAKKI *v.* VAYYAPRATH KUNHI KUTTI ALI (1905). **I. L. R. 29 Mad. 173**

——— ss. 54, 55—*Appeal against award—Hindu Law—Charity properties primâ facie inalienable.*—Properties set apart for charities are *primâ facie* inalienable; and where such properties are acquired under the Land Acquisition Act, the award made thereunder may direct the investment of the compensation money in Government securities. An appeal lies against the award in so far as it directs investment under s. 54 of the Land Acquisition Act. SHIVA RAO *v.* NAGAPPA (1905). **I. L. R. 29 Mad. 117**

LAND-HOLDER AND TENANT.

See LANDLORD AND TENANT.

LANDLORD AND TENANT.

See ADVERSE POSSESSION. **10 C. W. N. 343**

See BENGAL TENANCY ACT. **10 C. W. N. 351, 547**

See CIVIL PROCEDURE CODE, S. 244. **10 C. W. N. 240**

See EVIDENCE ACT (I OF 1872), S. 90. **I. L. R. 33 Calc. 571**
10 C. W. N. 422

See LEASE . **I. L. R. 33 Calc. 203**

See MADRAS RENT RECOVERY ACT.

See PRACTICE. **I. L. R. 33 Calc. 1094**

See TRANSFER. **10 C. W. N. 422, 449**

——— *Rate of rent—Decree by a co-sharer landlord, if evidence.*—A decree by a co-sharer landlord is not admissible as evidence as to the rate of rent in a suit brought by another co-sharer. ABDUL ALI *v.* RAJ CHANDRA DAS (1906). **10 C. W. N. 1084**

——— *Civil Procedure Code (Act XIV of 1882), s. 584—Power of Court on second appeal to examine evidence of usage—Custom.*—A ryot holding lands in a zamindari on a permanent tenure would, as regards land on which a money assessment is paid, be *prima facie* entitled exclusively to the trees thereon. Where the crops are shared between the ryot and zemindar, they will be jointly interested in such trees, but such presumptions may be rebutted by proof of usage or contract to the contrary. *Narayana Ayyangar* v. *Orr, I. L. R. 26 Mad. 252* followed. Although the provisions of s. 584 of the Code of Civil Procedure disallow a second appeal with reference to findings of fact, yet the existence or non-existence of usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of the Court, when it has to pronounce an opinion upon such questions, to examine the evidence bearing on it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it. Custom in India is transcendent law. A custom cannot be established by a few instances or by instances of recent date. Observations on the nature of evidence necessary to support custom. *Eranjoli Vishnu Nambudri* v. *Eranjoli Krishnan Nambudri, I. L. R. 7 Mad. 3,* followed. *Hurry Churn Dass* v. *Nimai Chand Keyal, I. L. R. 10 Calc. 138,* not followed. *Bai Shrinbai* v. *Kharshedji, I. L. R. 22 Bom. 430,* not followed. KAKARLA ABBAYYA *v.* VENKATA PAPAYYA RAO (1905) . **I. L. R. 29 Mad. 24**

LANDLORD AND TENANT—*continued.*

——— *Rent—Apportionment—Transfer of lessor's interest by operation of law—Transfer of Property Act (IV of 1882), ss. 2 (d), 36.*—*R* was *hikim* and as such was entitled to certain *mauzas,* which were held by *M* as mortgagee in possession under him. On the 7th Sraban 1307 *Fusli R* ceased to be *hikim* and plaintiff became *hikim* and took possession of the *mauzas* by ousting *M*. *M* had collected from the tenants of the *mauzas* the entire rent for the year 1307, and plaintiff brought this suit for a refund of the rent for the period from the 7th Sraban to the end of the year 1307. *Held,* that s. 36 of the Transfer of Property Act being inapplicable to the case, having regard to s. 2 (*d*) of that Act, the plaintiff's claim was not sustainable. *Satyendra Nath Thakur* v. *Nilkanta Singha, I. L. R. 21 Calc. 383,* and *Lakshminarappa* v. *Melothraman Nair, I. L. R. 26 Mad. 540,* referred to. MATHEWSON *v.* SHYAM SUNDER SINHA (1906) **I. L. R. 33 Calc. 786**

——— *Permanent tenure-holder—Underground rights—Mines and Minerals—Agricultural land—Transfer of Property Act (IV of 1882), ss. 108 (o), 117.*—Where a zemindar had created a permanent tenure in respect of agricultural land at a rental fixed in perpetuity: *Held,* that the tenure-holder would possess all underground rights, unless there was something express to the contrary. The provisions of the Transfer of Property Act would not apply to such a case and no restriction having been put on the use of the land, the tenure-holder's use of it would not be limited to agriculture by reason of the fact that the land was agricultural when the tenure was created. By the land-law of the country, when a permanent tenure is created, the zemindar, in the absence of express reservation, invests the tenure-holder with every right that can appertain to him short of the quit rent, and the tenure-holder can do

LANDLORD AND TENANT—*continued.*

what he likes with the land short of altogether destroying it. The common law of England regarding the mining rights of lessees for a term cannot be made applicable to permanent tenures in the rural parts of Bengal. *Prince Mahomed Buktyar Shah* v. *Rani Dhojamoni*, 2 C. L. J. 20, and *In re Parmanandas Jewandas*, I. L. R. 7 Bom. 109, distinguished. SHIBAM CHAKRAVARTI v. NARAIN SINGH DEO (1905) . . I. L. R. 33 Calc. 54
s.c. 10 C. W. N. 425

——— *Rent—Second appeal—Bengal Tenancy Act (VIII of 1885), as amended by Act III of 1898, ss. 105 and 109A—Case where the existing rent is not varied and the increase of rent is sought for on the ground of increase in area—Whether decision in such a case is a "decision settling a rent."*—The words in sub-s. (3) of s. 109A of the Bengal Tenancy Act (VIII of 1885, as amended by Act III of 1898), "not being a decision settling a rent," include cases in which the existing rents were not varied and increase of rent was sought for, amongst other grounds, on account of the increase in the area of the holdings. Therefore, where the Special Judge on appeal held that no case was made out for enhancement of rent on the ground of increase in the area of the holdings, no appeal lies against that decision to the High Court. RAMESWAR SINGH v. BHUBANESWAR JHA (1906).
I. L. R. 33 Calc. 837

——— *Benami transactions—Benami lease—Authority of benamdar registered tenant to pledge the tenure for arrears of rent—Mortgage—Form of mortgages—Agreement not to alienate—Transfer of interest—Creation of charge—Absence of attestation—Charge—Transfer of Property Act (IV of 1882), ss. 58, 59, 100—Charge for rent—Bengal Tenancy Act (VIII of 1885), s. 65.*—Where *A* held a tenure in the benami of *B*, who was the recorded tenant, and the latter without the knowledge or consent of *A* executed a bond in favour of the landlord, who knew that *B* was merely a benamdar, mortgaging or charging the tenure for arrears of rent due in respect thereof. *Held*, that the bond could not affect the tenure and that the landlord suing on the bond was not entitled to claim a charge on the land under s. 65 of the Bengal Tenancy Act. *Per* MOOKERJEE, *J.*—The test is whether *B* acted within the scope of his authority. A nominal owner has no implied authority to pledge the property in arrears on the real owner failing to pay the rent regularly. An instrument, by which the payment of money is secured on land, must be taken to create a mere charge, unless there is an indication in it that some interest in specific immoveable property was transferred; a clause entitling the creditor to recover his dues by attachment and sale of the property and a clause against alienation lend support to the view that a mere charge was intended to be created. S. 100 of the Transfer of Property Act does not mean that a transaction purporting on the face of it to be a mortgage is converted into a charge, if the instrument cannot operate as a mortgage by reason of defective execution or non-compliance with the formalities prescribed by the law. ROYZUDDI SHEIK v. KALI NATH MOOKERJEE (1906).
I. L. R. 33 Calc. 985

——— *Bengal Tenancy Act (VIII of 1885), ss. 20, cl. (7), and 180—Chur land—Onus of proof—Presumption of holding chur land continuously for twelve years—Reg. XI of 1825, s. 4—Raiyat having no pre-existing right to the land—Right to accretion.*—*Held*, that the presumption, which is created by s. 20, cl. (7) of the Bengal Tenancy Act, in respect of that section could not be applied to s. 180 of that Act. In *dearah* or *chur* land the person, who alleged that he had been for twelve continuous years in possession, would have to prove that allegation. *Held*, further, that s. 4 of Reg. XI of 1825 could not apply, there being no pre-existing right to the land in the tenants, to which any right to the later accretion can be said to be annexed. BENI PERSAD KOERI v. CHATURI TEWARY (1906).
I. L. R. 33 Calc. 444

——— *Bengal Tenancy Act (VIII of 1885), ss. 65 and 170—Plaintiff also a landlord at the date of the suit and decree for arrears of rent—Sale—Tenure—Claim—Civil Procedure Code (Act XIV of 1882), s. 278.*—If at the time when a suit for arrears of rent is instituted and a decree made the plaintiff is still the landlord, the fact that he has subsequently sold his interest in the property does not prevent him from obtaining the benefit of s. 65 of the Bengal Tenancy Act and executing the decree against it. The suit having been instituted and the decree passed under this Act, s. 170 of the Bengal Tenancy Act excludes the operation of s. 273 of the Civil Procedure Code. *Hem Chandra Bhanjo* v. *Mon Mohini Dassi*, 3 C. W. N. 604, overruled. KHETRA PAL SINGH v. KRITARTHAMOYI DASSI (1906) . . . . I. L. R. 33 Calc. 566

——— *Ejectment, suit for—Service-tenure—Denial of landlord's title—Notice to quit—Determination of lease—Transfer of Property Act (IV of 1882), ss. 106, 111—Bengal Tenancy Act (VIII of 1885), ss. 155, 181.*—A lessee of a service-tenure incurs a forfeiture of his tenancy by denial of the landlord's title; and the landlord in a suit for ejectment would be entitled to recover judgment, if he did, by some act or other, declare his intention to determine the lease antecedent to the institution of the suit, notice to quit in such a case not being obviously necessary; otherwise the suit should be dismissed. Such a case falls within the Transfer of Property Act, and not under the Bengal Tenancy Act. *Haidri Begam* v. *Nathu*, I. L. R. 17 All. 45, and *Ansar Ali Jemadar* v. *C. E. Grey*, 2 C. L. J. 403, referred to. ANANDAMOYEE v. LAKHI CHANDRA MITRA (1906) . I. L. R. 33 Calc. 339

——— *Right of co-sharer landlords to collect rent jointly—Bengal Tenancy Act (VIII of 1885), s. 65.*—*A* and B being co-sharer landlords collected rent from their tenants *C* and *D* separately. Subsequently *C* and *D* sold their interests to *E*. *A* and *B* then demanded rent from *E* jointly. *E* objected on the ground that *A* and *B* having collected their

LANDLORD AND TENANT—*continued.*

rent separately for many years, could not now sue jointly. *Held*, that there was nothing to prevent the co-sharer landlords from suing *E* jointly for their rent, there being no evidence to show that the former agreement to collect rent separately was to be perpetual. *Shyama Charan Bhuttacharya* v. *Akhoy Kumar Mitter*, *10 C. W. N. 167*, *Grish Chunder Mukhopadhyaya* v. *Chhatrankar Ghose*, *3 C. L. J. 379*, followed. *Gani Mahomed* v. *Moran*, *I. L. R. 4 Calc. 96*, *Gopal Chandra Das* v. *Umesh Narain Chowdhury*, *I. L. R. 17 Calc. 695*, referred to. *Raja Pramoda Nath Roy* v. *Raja Ramoni Kanta Roy*, *9 C. W. N. 34*, distinguished. AKSHOY KUMAR MITRA v. GOPAL KAMINI DEBI (1906).

I. L. R. 33 Calc. 1010
s.c. 10 C. W. N. 952

——— *Determination of tenancy—Abandonment—Transfer of non-transferable holding—Effect of transfer—Fictitious transfer.*—Where a raiyat of a non-transferable holding executed a conveyance in respect thereof in favour of the defendants, but continued notwithstanding to reside on the property and carry on the cultivation for some time, and the rent of the holding was paid by the defendants in the name of the raiyat: *Held* (GHOSE, *C. J.*, and GEIDT, *J.*) that, if the transfer was not intended to be an operative transaction, the mere fact that the raiyat went away from the holding to reside elsewhere would not be sufficient to make out a case of abandonment so as to entitle the landlord to re-enter. MATHURA MANDAL v. GANGA CHARAN GOPE (1905) . . . **I. L. R. 33 Calc. 1219**
s.c. 10 C. W. N. 1033

——— *Liability to ejectment—Right of occupancy—Effect of acquisition of right of occupancy over portion of holding.*—On the expiry of the term of lease, by which a *ghat* together with certain *jote* lands belonging to the plaintiffs were let out at a certain annual *jama* for both the *jote* lands and the *ghat*, the defendants held over for many years on the same terms. The plaintiffs, having given the defendants notice to quit, sued to recover *khas* possession of the *ghat*. *Held*, that the plaintiffs were entitled to recover *khas* possession of the *ghat*, although the defendants had acquired the position of occupancy raiyats as regards the *jote* lands. HAYES v. GHINA BARHI (1906) . **I. L. R. 33 Calc. 459**

——— *Transfer—Right of occupancy—Original tenant remaining in possession as sub-tenant of the transferee—Abandonment—Bengal Tenancy Act (VIII of 1885), s. 87—Ejectment.*—Where a tenant having a non-transferable right of occupancy sold such right to a third person, obtained a sub-lease from the purchaser and remained in possession of the land and was cultivating the same. *Held*, that the landlord was not entitled to the *khas* possession as against him. *Dina Nath Roy* v. *Krishna Bejoy Saha*, *9 C. W. N. 379*: *Sristeedhur Biswas* v. *Mudan Sirdar*, *I. L. R. 9 Calc. 648*, followed. *Kallinath Chakravarti* v. *Upendra Chunder Chowdhry*, *I. L. R. 24 Calc. 212*, distinguished. In order to entitle a landlord to re-enter on abandonment by the tenant, it must be an abandonment in the words of s. 87 of the Bengal Tenancy Act, namely, that the raiyat voluntarily abandons his residence and ceases to cultivate, without notice to the landlord and without arranging for the payment of his rent as it falls due. *Nurendro Narayan Roy* v. *Ishan Chunder Sen*, *22 W. R. 22*, and *Dwarka Nath Misser* v. *Hurrish Chunder*, *I. L. R. 4 Calc. 925*, referred to. MADAR MONDAL v. MAHIMA CHANDRA MAZUMDAR (1906).

I. L. R. 33 Calc. 531

——— *Transfer of a tenure—Liability of tenant—Bengal Tenancy (Act VIII of 1885), ss. 12, 17, 88.*—Where the defendant held separately a share of a *sikmi taluq* under the plaintiff, and transferred that share to a third party and served a notice of the transfer on the plaintiff landlord as prescribed by s. 12 of the Bengal Tenancy Act. *Held*, that the act of the defendant in making the transfer did not amount to a sub-division of the tenure, and that the defendant was not liable for rent for any period subsequent to the transfer. *Chintamani Dutt* v. *Rash Behari Mondul*, *I. L. R. 19 Calc. 17*, referred to. KALI SUNDARI DEBI v. DHARANI KANTA LAHIRI (1905).

I. L. R. 33 Calc. 279

——— *Mineral rights, reservation by lessor of—Grant of surface rights.—Lessor's right to prospect—Reasonable exercise of right*—When the surface land is granted and the minerals are excepted or when minerals are granted and the surface land is excepted, such powers as are necessary to get the minerals are granted or reserved as the case may be as a necessary incident of the grant or reservation. The reservation of the mineral rights or the grant of such rights apart from the surface rights must be taken to carry as incident to it the power not only to go upon the land and work the minerals known to be underground, but to go on the land and conduct the ordinary preliminary operations by boring or otherwise to ascertain (when it is not known), if there are minerals underground. The owner of the underground rights will however be justified in doing such acts only as may be reasonably necessary for the above purposes. KUMAR RAMESSUR MALIA v. RAM NATH BHATTACHARJEE (1905) . **10 C. W. N. 17**

——— *Bengal Tenancy Act (VIII of 1885), ss. 65, 159—Sale in execution of a decree for arrears of rent at the instance of a co-sharer landlord—Interest of unrecorded tenant how effected.*—An occupancy holding was recorded in the landlord's books in the names of *N*, *B* and *T* as tenants. Plaintiff purchased the interest of *N* and *B*. The validity of his purchase was established. Subsequently one of the co-sharer landlords brought a suit against *N*, *B* and *T* for his share of the rent and got a decree; in execution of the decree the holding was sold and purchased by the 1st defendant. *Held*, that the 1st defendant purchased only the right, title and interest of the judgment-debtors. AFRAZ MOLLAH v. KULSUMANNESSA BIBEE (1905).

10 C. W. N. 176

LANDLORD AND TENANT—*continued.*

——— *Mineral rights—Grant of permanent tenure—Agricultural lands—Reservation.*—A grant of a permanent tenure, when the subject-matter of the grant is agricultural land, conveys to the grantee all the underground rights, unless there be express reservations to the contrary. In this country when a man obtains permanent possession of land with heritable and transferable rights, then in the absence of any reservation, he obtains it with all rights attaching to it from the centre of the earth to the sky. SRIRAM CHUKRABUTTY v. HARI NARAIN SINHA (1905) . . . 10 C. W. N. 425 s.c. I. L. R. 33 Calc. 54

——— *Lakhiraj or mal—Onus—Landlord and tenant—Pasture land.*—When a landlord sues for possession of land lying within the ambit of his estate on the ground that it is *mal* and not *lakhiraj* of the defendant, the burden of proof in the first instance is upon the plaintiff. *Hari Har Mukhopadhya* v. *Madhab Chandra Babu*, 8 *B. L. R. 566*, followed. The reason of the rule as regards the burden of proof is mainly that, where possession for a long time by a defendant is admitted to be undisturbed, the plaintiff must give affirmative proof of the land being part of his decennially settled estate. The fact of the land being pasture land raises a presumption in favour of the plaintiff. *Ooma Churn Chowdhury* v. *Umbika Churn Dey*, *20 W. R. 285*, relied on. MILAN v. MAHOMED ALI (1903) . . . . 10 C. W. N. 434

——— *Bengal Tenancy Act (VIII of 1885), s. 178, sub-s. (1). cl (a) and sub-s. (3), cl. (a)—Contract stipulating re-entry on raiyat's death—Validity—Bengal Act VIII of 1869, s. 7.*—A valid contract of tenancy providing that the tenant, a raiyat, should hold the land for his lifetime, and that the landlord would have the right to re-enter on his death, could be created before the passing of the Bengal Tenancy Act. Such a contract does not come within the terms of the provisions in cl. (*a*), sub-s. (*1*) or cl. (*a*), sub-s. (*3*) of s. 178 of the Bengal Tenancy Act, and is therefore enforcible. The contract in this instance having been created by a *solenamah* in 1877 and the tenant dying in 1902,—*Held*, that the landlord can recover *khas* possession. BAUL CHANDRA CHAKRAVARTI v. NISTARINI DEBI (1905). 10 C. W. N. 533 s.c. I. L. R. 33 Calc. 136

——— *Usufructuary mortgage—Ejectment.*—When the tenant of a non-transferable holding executes a usufructuary mortgage of it, places the mortgagee in possession, abandons the holding and leaves the village, the landlord is entitled to treat the mortgagee as a trespasser and to ask for his ejectment. *Krishna Chandra Dutt* v. *Miran Bajania*, *10 C. W. N. 499 : s.c. 3 C. L. J. 223*, followed. RASIK LAL DUTT v. BIDHU MUKHI DASI (1906) . . . 10 C. W. N. 719 s.c. I. L. R. 33 Calc. 1094

——— *Permanent Lease—Minerals.*—A permanent lease including "all rights of various kinds, with the exception only of homestead, would include the minerals. SHAMACHARAN NANDI v. ABHIRAM GOSWAMI (1906) . 10 C. W. N. 738 s.c. I. L. R. 33 Calc. 511

LANDLORD AND TENANT—*concluded.*

——— *Joint landlords—Partition—Effect on holding—Division of holding—Estates Partition Act (Bengal Act VIII of 1867).*—An estate having been partitioned between the plaintiff and his co-sharers under Bengal Act VIII of 1876, a portion of a holding, which formerly appertained to the joint estate, fell within plaintiff's share: *Held*, that the partition had the effect of dividing the holding so that the plaintiff became the sole landlord with regard to the portion of the holding that fell within his share of the estate. *Sarat Sundari Debya* v. *Ananda Mohun Sarma*, *I. L. R. 5 Calc. 273* ; *Hem Chandra Chowdhry* v. *Kali Prossunno Bhaduri*, *I. L. R. 26 Calc. 832*, referred to. *Durga Prosad Sen* v. *Doula Gazee*, *1 C. W. N. 160 and 161* ; *Rai Kamaleswaris* v. *Maharaja Harbullabh Narain Singh*, *2 C. L. J. 36*, distinguishd. Bengal Act VIII of 1876, whilst it did not provide for the division of holdings, did not also contain any prohibition against such division. PROTAP CHANDRA DAS v. KAMALE KANTA SHAHA (1906) . . . . 10 C. W. N. 818

——— *Tenancy—Non-agricultural land.*—In a case where it was quite uncertain as to what was the date from which a tenancy in respect of non-agricultural land ran. *Held per* RAMPINI, *J.*—That the presumption was that the tenancy was a monthly tenancy expiring with the last day of each month of the Bengali year. Where the notice to quit with respect to such a tenancy was dated the 25th July 1899 and was served on the tenant on the 8th of August following, and the tenant was desired to quit on the last day of the month of Chait 1306 (12th April 1900). *Held per* RAMPINI, *J.*—That the notice was valid. Further, that, when such notice was given on behalf of Government, the Collector was competent to sign it. RAKHAL CHANDRA TEWARY v. SECRETARY OF STATE FOR INDIA (1906). . 10 C. W. N. 841

LEASE.

See ENHANCEMENT . 10 C. W. N. 607

———*Coal—Surface rights—Subsoil rights—Mineral right—Landlord and tenant—Transfer of Property Act (IV of 1882), s. 108, cl. (o)—Damages—Injunction—Specific Relief Act (I of 1877), s. 52.*—Of the land in suit, which belonged to the Jheria Raj, a lease was granted in 1824 to the principal defendants, who on 11th October 1893 transferred their rights as lessees to the other defendants, to whom on 2nd April 1896 the Rajah also granted a lease of the underground rights in the land with the power of cutting and raising coal. In 1849 the then Rajah had made a *khorposh* or maintenance grant of the same land to a member of the Raj family, who on 1st March 1893 leased whatever rights he had in surface and sub-soil to the plaintiff. In a suit brought for a declaration of the plaintiff's absolute

LEASE—*concluded.*

proprietary right to the land and the minerals, for possession, damages and for an injunction to restrain the defendant from cutting, raising and appropriating coal. *Held*, that there was no direct evidence of the terms of the grant to the plaintiff's lessor in 1849, which could not therefore be presumed to be more than a grant of the rents of the land for the life of the grantee, and did not carry with it the right to open mines and raise minerals; and the present rights in the surface land were in the lessees under the lease of 1824 and their assignees. It was contended that the plaintiff nevertheless had a sufficient interest in the soil to entitle him to object to the working of minerals in or under it without his consent. *Held*, that the plaintiff's right being limited to the receipt of rents for the life of his lessor, and there being no evidence that the security of those rents would be in any degree impaired by anything the defendants had done or might do, or that the enjoyment of the right vested in the plaintiff had been or would be interfered with by them, the Court in the exercise of the discretion given by s. 52 of the Specific Relief Act (I of 1877) refused to grant an injunction. TITURAM MUKERJI *v.* COHEN (1905) **I. L. R. 33 Calc. 203**

——— *Construction—Mining rights—Exception of minerals—Implied reservation of incidental rights—Decree—Form of decree.*—Where a lessor in granting a lease of surface lands had excepted the minerals,—*Held* that, in excepting the minerals the lessor impliedly reserved to himself as a necessary incident the right to dig for and win them. The reservation of mineral rights apart from the surface rights must be taken to carry as incident to it the power not only to go upon the land and work the minerals known to be underground, but to go on the land to conduct the ordinary preliminary operations by boring or otherwise to ascertain, when it is not known, if the minerals are underground. *Dand* v. *Kingscote, 6 M. and W. 174, Rowbotham* v. *Wilson, 8 H. L. C. 348, Earl of Cardigan* v. *Armitage, 2 B. and C. 197, Ramsay* v. *Blair, 1 App. Cas. 701,* referred to. Form of the decree in a suit by the lessor for a declaration of his rights under the lease discussed. *Gandoo Mahata* v. *Nilmonee Singh, 1 C. L. J. 526,* referred to. RAMESWAR MALIA *v.* RAM NATH BHUTTACHARJEE (1905). **I. L. R. 33 Calc. 462**

——— *Lease by mortgagor—Sub-lease pendente lite—Rights of mortgagee.*—*Held*, that if a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them. MACLEOD *v.* KISSAN (1904). **I. L. R. 30 Bom. 250**

LEGAL PRACTITIONERS.

See ACT XVIII OF 1879.

See ADVOCATE.

LEGAL PRACTITIONERS' ACT (XVIII OF 1879).

——— *Authority of Munsif to direct a pleader to dismiss his clerk.*—A Munsif has no authority in law to direct any pleader to dismiss any of his clerks; he has no inherent power to refuse to recognise as a pleader's clerk a person, who is not a *bonâ fide* clerk. If anybody acts unprofessionally or in any way not warranted by law, he can take proceedings under the Legal Practitioners' Act or under any other Act that may be applicable. PROMOTHA NATH MAJUMDAR, IN RE (1905). . . **10 C. W. N. 49**

——— s. 28—*Oral agreement to pay full legal fee.*—A suit for damages for breach of contract based on an oral promise "to pay full legal fees and to engage the plaintiff as a pleader on behalf of the defendant" is barred by s. 28 of the Legal Practitioners' Act. *Bazi-ud-din* v. *Karim Bakhsh, I. L. R. 12 All. 169, Rama* v. *Kunji, I. L. R. 9 Mad. 375, Sarat Chunder Roy Chowdhury* v. *Chandra Kanta Roy, I. L. R. 25 Calc. 805,* and *Subba Pillai* v. *Rama Sami Ayyar, I. L. R. 29 Mad. 512,* referred to. RAGHUNATH SARAN SINGH *v.* SRI RAM (1906) . . **I. L. R. 28 All. 764**

——— *Letters Patent of the Allahabad High Court, ss. 7, 8—Rules of the Court No. 197—Disciplinary authority over an advocate—Libel on the Judges—Reasonable cause for suspension from practice.*—*Held*, that the High Court at Allahabad had jurisdiction under ss. 7, 8 of its Letters Patent and the rules framed thereunder, to deal with the alleged misconduct of the appellant, a member of the English Bar, who had been admitted as an advocate of the Court, and that under s. 2 a division Court consisting of three Judges (five being then present in Allahabad) was properly constituted in that behalf. *Held*, further, that it was the intention of s. 8 to give a wide discretion to the High Court, in regard to the exercise of a disciplinary authority. It is reasonable cause for suspending an advocate from practice that he has been found guilty of contempt whilst defending, in a publication for which he was solely responsible, his misbehaviour as an advocate conducting a case before the Court by an article which was a libel reflecting on the Judges in their judicial capacity and in reference to their conduct in the discharge of their public duties. IN RE SARBADHICARY (1906) . **L. R. 34 I. A. 41** s.c. **I. L. R. 29 All. 95**

——— *Charges against an advocate—Evidence—Conviction reversed.*—The appellant, a barrister, and advocate of the Chief Court of Lower Burma was charged before the said Court with gross professional misconduct, in that (1) whilst employed as an advocate for the prosecution in an abduction case, he advised the prosecutor's family to say nothing about letters having been received from his abducted daughter and designedly withheld from the police and the senior advocate for the prosecution the fact that such letters had been received, (2) that whilst the trial was proceeding and while acting as an advocate for the prosecution, he suggested or hinted to the prosecutor that he should influence or attempt to influence by improper means a certain expert witness

LEGAL PRACTITIONERS' ACT (XVIII OF 1879)—*concluded.*

in handwriting to give evidence favourable to the prosecution in connection with certain letters produced. He was acquitted on the first charge, but convicted on the second and dismissed from his office as an advocate of the said Court,—*Held*, on an examination of the evidence that he must be acquitted on the second charge also. Evidence given by the said senior advocate and by the Government advocate of the prosecutor's statements to them, in the absence of the appellant, even if admissible would not avail to contradict the prosecutor's sworn denial that the appellant had advised him to bribe. Other evidence given was wholly insufficient and the improbabilities of the appellant having acted as charged were very great. BOMANJEE COWASJEE *v.* CHIEF JUDGE AND JUDGES OF THE CHIEF COURT OF LOWER BURMA (1906) . L. R. 34 I. A. 55
s.c. I. L. R. 34 Calc. 129

LEGAL REPRESENTATIVE.

See CIVIL PROCEDURE CODE, s. 367.

LETTERS OF ADMINISTRATION.

See PROBATE . . 10 C. W. N. 1001

See SUCCESSION ACT.
10 C. W. N. 614

——— *Prostitute's estate—Application for letters of administration by natural heir—Right to succeed—Escheat.*—When persons claiming to be brother's sons of a deceased prostitute applied for letters of administration to her estate—she having acquired the same by carrying on the profession of a prostitute. *Held* (WOODROFFE, *J.*, *dubitante*), that the application was rightly rejected, inasmuch as the applicants were not entitled to inherit such estate. *Taramoni Dasi* v. *Mutte Buneanee, 7 Sel. Rep. 273; In the goods of Kamini Mony Bewa, I. L. R. 21 Calc. 697; Surnomoyee Bewa* v. *Secretary of State, I. L. R. 25 Calc. 254*, followed. *Subaraya Pillai* v. *Rama Sami Pillai, I. L. R. 23 Mad. 171*, referred to. BHUTNATH MONDOL *v.* SECRETARY OF STATE FOR INDIA (1906) . . . . 10 C. W. N. 1085

LETTERS PATENT, HIGH COURTS.

——— cl. 10—*Appeal—Revision—Civil Procedure Code, s. 622.*—No appeal under cl. 10 of the Letters Patent of the Court will lie from an order of a single Judge of the Court disposing of an application under s. 622 of the Code of Civil Procedure. *Naimullah Khan* v. *Ihsan-ul-lah Khan, I. L. R. 14 All., 226, Gauri Datt* v. *Parsotam Dass, I. L. R. 15 All. 373, Hira Lal* v. *Bai Asi, I. L. R. 22 Bom. 891*, and *Sriramulu* v. *Ramasam, I. L. R. 22 Mad. 109*, followed. NISAR ALI *v.* ALI ALI (1905) . . . . I. L. R. 28 All. 133

——— cl. 12—*Contract Act (IX of 1872), ss. 46-49, 94—Commission agent—Place of payment of debt—Cause of action—Jurisdiction.*—The plaintiff, a commission agent and merchant carrying on business in Bombay, gave instructions to the defendants, also commission agents and merchants carrying on business at Phulgaon in the Birda Zilla, to enter into certain transactions on behalf of the plaintiff, and the defendants entered into those transactions as commission agents on behalf of the plaintiff. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendants at Phulgaon. Subsequently the plaintiffs having applied for leave under clause 12 of the Letters Patent brought a suit in the High Court at Bombay to recover the amount due from the defendants at the foot of the accounts between himself as principal and the defendants as commission agents at Phulgaon, the defendants pleaded want of jurisdiction,—*Held*, that as (1) instructions were sent to the defendants from Bombay, (2) accounts were rendered to the plaintiff (at Bombay), and (3) demand was made from Bombay to the defendants at Phulgaon, the payment of money therefore was clearly to be in Bombay. *Per* CURIAM —The expression cause of action means the bundle of facts, which it is necessary for the plaintiff to prove, before he can succeed in his suit. Not irrelevant, immaterial facts, but material facts without which the plaintiff must fail... If any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court and leave is given, then it is open to the defendants to contend at the hearing that the Court has no jurisdiction... Where no specific contract exists as to the place where the payment of the debt is to be made, it is clear it is the duty of the debtor to make the payment, where the creditor is. MOTILAL *v.* SURAJMAL (1904) . . . I. L. R. 30 Bom 167

——— cl. 12—*Leave of the Court—Jurisdiction of the Court to entertain suit—Rules and Forms of the Bombay High Court, Rule 361—Suit against a firm—Addition of the names of partners constituting the firm—Practice and Procedure.*—The plaintiffs sued, on the 19th November 1904, on the Original Side of the Bombay High Court, "the firm of Shaw, Wallace & Co. as it was constituted on the 13th September 1898 and the partners in the said firm on that date." The action was for breach of an agreement dated the 13th of September 1898 executed by the defendant firm in favour of plaintiffs at Calcutta. The plaint alleged "the defendants carry on business in Bombay: part of the cause of action arose in Bombay." Prior to the service of summons and pursuant to a chamber order of 22nd December 1904, the plaint was on the 7th January 1905 amended by the addition of the names of Messrs. Wallace, Ashton, Greenway, Hue and Meakin. The first four were at the date of plaint and even afterwards carrying on business: and Secherau, one of the partners, having died in the meanwhile, his executor Meakin was also added as a party defendant. Before, the death of Secherau, the partnership took in a new partner: and this new partnership opened a branch office in Bombay. Prior, however, to the presentation of the plaint, leave was granted under clause 12 of the Letters Patent. It was objected on behalf of the firm that leave under clause 12 should not have

LETTERS PATENT, HIGH COURTS— *continued.*

been granted: that the order allowing the amendment was wrong and that the Court had no jurisdiction to receive the suit:—*Held*, (*1*) that Messrs. Wallace, Ashton, Greenway and Hue, according to the allegations in the plaint, were liable as co-partners to the plaintiffs and none the less because the estate of the deceased co-partner might also be liable together with them. It was also stated that they were carrying on business within the jurisdiction and this would be so though there might be associated with them a partner, which was not a member of the firm when Shaw, Wallace & Co. entered into the agreement, on which the suit was based. (2) That the case fell within Rule 361 of the Rules and Forms of the Bombay High Court. (3) That the suit as originally framed was rightly received irrespective of leave under clause 12 of Letters Patent and the defendants' contention that the Court had no jurisdiction failed. (4) That Meakin, as the executor of Secherau, was wrongly added as a defendant. As to the other four defendants the amendment was useless, if they were already parties: if they were not, then the amendment should not have been made except by an order of a Judge, seeing that leave had been obtained under clause 12 of the Letters Patent. Rule 361 of the Rules and Forms of the Bombay High Court does not extend the jurisdiction of the Court: it merely sanctions the use of the firm's name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length. SHAW, WALLACE & Co. *v.* GORDHANDAS (1905).

I. L. R. 30 Bom. 364

——— cl. 12—*Jurisdiction over foreigner present or absent, when suit instituted—What amounts to dwelling within the jurisdiction—In administration suit undertaking to administer forms part of cause of action—Estoppel against executor taking probate and realising assets—Administration may be ordered of immoveable property outside jurisdiction.*—Suit on the Original Side of the High Court by three executors and trustees of the will of *A* against *A*'s son the fourth executor, and trustee, praying for his removal and for the administration of the estate by the Court. The executors had obtained probate of the will from the High Court limited to the assets in the Presidency, and the assets realized by virtue of this grant had come into the hands of the defendant, who subsequently repudiated the will and claimed to take the estate of the deceased by survivorship. Some months before the institution of this suit the defendant, who was domiciled in the Mysore State, had left his house in Mysore in charge of a peon, and had brought his wife and child to Madras and taken a house there, and apprenticed himself for one year to a Vakil of the High Court with a view to becoming enrolled as a Vakil. He was present in Madras on 30th of August 1901, when the plaint was filed, but left on the following day before the summons was served. MOORE, *J.*, directed the defendant to be removed and passed a preliminary order for the general administration of the estate. *Held*, on appeal, that the High Court had jurisdiction under cl. 12 of the Letters Patent to try the suit. *Per* ARNOLD WHITE, *C. J.*—The jurisdiction conferred by cl. 12 of the Letters Patent where the cause of action arises wholly, or in part, within Madras extends to suits against absent foreigners. Further, in this case, the presence of the defendant within the jurisdiction when the suit was instituted, that is, when the plaint was filed, would give jurisdiction. Observations as to the jurisdiction of the old Supreme Court now vested in the High Court. *Per* SUBRAHMANIA AYYAR, *J.*—The presence of the defendant in Madras when the suit was instituted by filing the plaint placed him in the position of an ordinary subject of His Majesty with regard to jurisdiction. Even if the defendant had been absent when the suit was instituted, there would be nothing contrary to international law in holding that the jurisdiction conferred by cl. 12, when the cause of action arises wholly or in part within the jurisdiction applied to his case. According to the general principles of English jurisprudence temporary presence and the accrual of the cause of action within the limits of the Court would each by itself be a ground of jurisdiction; and in this case the cause of action which accrued in Madras by its very nature made the defendant liable to the authority of the Court. *Annamalai Chetty* v. *Murugasa Chetty, I. L. R. 25 Mad. 544, Girdhar Damodar* v. *Kassigar Hiragar, I. L. R. 17 Bom. 662, Garayal Singh* v. *Raja of Faridkote, L. R. 21 I.A. 171,* and *Tadipalli Subba Rao* v. *Nawab Syed Mir Gullam Alli Khan, I. L. R. 29 Mad. 69,* considered and explained. *Per* CURIAM.—In the circumstances set out above, the defendant was dwelling in Madras within the meaning of cl. 12 of the Letters Patent. *Goswami Shri Ghordhariji* v. *Shri Govardhanlalji, I. L. R. 18 Bom. 290,* considered; further the undertaking to administer the estate given by the defendant at the time of the grant of probate was part of the cause of action arising within the jurisdiction within the meaning of the clause. The defendant having with full knowledge of its rights accepted the office of executor and taken probate of the will, and under its authority collected assets and acted so as to cause third parties to alter their position was estopped from disputing the validity of the will on the dispositions and conditions contained therein. The preliminary order for the general administration of the estate of the deceased was not open to objection on the ground that part of the immoveable property of the deceased was situated in Mysore. In compelling the defendant to perform the trusts of the will the Court is acting *in personam*, and when so acting has the same jurisdiction with regard to any contract made or equities between persons here as it has where the lands or assets are locally situate within the jurisdiction. SRINIVASA MOORTHY *v.* VENKATA VARADA AYYANGAR (1905).

I. L. R. 29 Mad. 239

——— cl. 13.

See TRANSFER OF SUIT.

I. L. R. 30 Bom. 246

——— cl. 13—*High Court, Bombay—Power to remove cause from Court of Resident at Aden—*

LETTERS PATENT, HIGH COURTS— *continued.*

Power of superintendence—If dependent on Appellate Jurisdiction—Charter Act (24 and 25 Vict., c. 104), s. 15—Act II of 1864.—The Court of the Resident at Aden is subject to the superintendence of the High Court at Bombay within the meaning of cl. 18 of the Letters Patent for the Bombay High Court, although under Act II of 1864, which provides for such superintendence, no appeal lies from the Court of the Resident to the High Court. In exercise of such powers of superintendence, the Bombay High Court can remove a suit from the Court of the Resident for trial by itself. The power of transfer contained in s. 15 of the Charter Act has nothing to do with the power of removal conferred by the Letters Patent and the Letters Patent make superintendence and not Appellate Jurisdiction the condition of the exercise of the power of removal. MUNICIPAL OFFICER, ADEN v. HAJI ISMAIL HAJI (1906) . **10 C. W. N. 185**

——— cl. 15.

See APPEAL . . **10 C. W. N. 1323**

——— cl. 15—*Judgment—Filing appeal out of time—Application for extension—Order refusing, if appealable—Limitation Act (XV of 1877), s. 5, cl. (2).*—An order refusing to enlarge the time for preferring an appeal, which had become time barred, is not a judgment within the meaning of cl. 15 of the Letters Patent. *The Justice of the Peace for Calcutta* v. *The Oriental Gas Co., 8 B. L. R. 433; Kishen Pershad Panday* v. *Tiluckdhari Lal, I. L. R. 18 Calc. 182; Mohabir Pershad Sing* v. *Adhikari Kunwar, I. L. R. 21 Calc. 473; Mulji Virji* v. *Bangabashi Saha, 9 C. W. N. 502; Brij Coomaree* v. *Ramrick Das, 5 C. W. N. 781,* referred to. GOVIND LAL DAS v. SHIB DAS CHATTERJEE (1906). **10 C. W. N. 986**

——— cl. 36.

See COPYRIGHT . . **10 C. W. N. 571**

——— *Probate and Administration Act (V of 1881), s. 45—Grant of effects unadministered—Long lapse of time—Presumption that estate has been administered—Property held as sebait, if part of estate.*—A testator died in 1884 leaving a Will, whereby he appointed his widow executrix, and bequeathed the whole of his ancestral and self-acquired properties to her. The Will contained a further direction that the widow shall perform the *sheba* of certain *Thakurs* of which the testator was a *shebait,* and that after her death "he who may remain as my heir, as *shebait,* shall perform the *sheba* from the income of the estates of the *debsheba.*" The widow took out probate in 1885 and died in 1902. Upon an application by the reversioner for letters of administration, the District Judge held that as the last-mentioned direction in the Will contemplated some administration after the death of the widow, the petitioner was entitled to take out letters of administration. *Held,* that the order of the District Judge was erroneous. The Court may properly presume in the absence of anything to the contrary and after his long lapse of time that the estate has been administered. The direction as to *sheba,* upon which the order was based, did not relate to the testator's own property. CHANDI CHARAN MANDAL v. BANKU BEHARY MANDAL (1906). **10 C. W. N. 432**

LETTERS PATENT, HIGH COURTS— *concluded.*

LICENSE.

See EASEMENTS ACT, s. 60 (*b*).

LIFE ESTATE.

See HINDU LAW . **10 C. W. N. 23**

LIGHT AND AIR.

See EASEMENTS ACT. **I. L. R. 30 Bom. 319**

LIMITATION.

See HINDU LAW . **10 C. W. N. 257**

See MORTGAGE . **10 C. W. N. 689**

See PUBLIC DEMANDS RECOVERY ACT. **10 C. W. N. 1187**

See SPECIFIC PERFORMANCE. **I. L. R. 33 Calc. 633**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 90 . **I. L. R. 33 Calc. 867**

——— *Foreclosure decree—Possession, formal and actual.*—Where formal possession has been given under a final foreclosure decree, but the mortgagor has continued in actual possession, the remedy is by suit and not under s. 244 of the Code of Civil Procedure. Consequently the law of limitation applicable is that governing suits, not execution proceedings. *Shama Charan Chatterji* v. *Madhub Chandra Mookerji, I. L. R. 11 Calc. 93, Hari Mohan Shaha* v. *Baburali, I. L. R. 24 Calc. 715,* and *Mangli Parsad* v. *Debi Din, I. L. R. 19 All. 499,* referred to. JAGAN NATH v. MILAP CHAND (1906). **I. L. R. 28 All. 722**

——— *Civil Procedure Code (Act XIV of 1882), Chap. XIX, div. H—Decree for possession—Execution of decree—Obstruction—Application for removal of obstruction numbered and registered as suit—Adverse possession.*—On the 1st June 1889 defendant's husband Vishnu sold certain land to Vithal and passed to him a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of the period, Vishnu, and after his death his widow, the defendant, continued in possession. Afterwards the plaintiffs, to whom the land had been sold, having obtained a decree for possession against the sons of Vishnu, Vishnu's widow, Kashibai, caused obstruction to delivery of possession in execution of the decree. The plaintiffs thereupon, on the 22nd January 1902, applied for the removal of the obstruction and the Court, on the 26th July 1902, ordered that their application be numbered and registered

LIMITATION—*continued.*

as a suit between the decree-holders as plaintiffs and the claimant as defendant under s. 331 of the Civil Procedure Code (Act XIV of 1882), Chap. XIX, div. H. *Held*, reversing the decree of the lower Appellate Court, that the suit was not time-barred. The claimant was not entitled as against the decree-holders to count the time up to the 26th of July 1902, when the application was numbered as a suit, as the period of his adverse possession; for it had ended prior to the 20th March 1890, by reason of the proceedings under division H. of Chapter XIX of the Code of Civil Procedure, initiated on 22nd of January 1902. KRISHNAJI *v.* KASHIBAI (1905).

I. L. R. 30 Bom. 115

——— *Fraud—Defence.*—*Held*, that a defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea, though he may have himself brought an unsuccessful suit to set aside the transaction, and is not under certain circumstances like those in hand precluded from urging that plea by lapse of time. *Rangnath* v. *Govind, I. L. R. 28 Bom. 639*, followed. *Mahomed* v. *Ezekil, 7 Bom. L. R. 772*, not followed. MINALAL SHADIRAM *v.* KHARSETJI (1906).

I. L. R. 30 Bom. 395

——— *Money secured by a pledge—Suit for money lent—Three years from the time of the loan.*—A suit for the recovery of money secured by a pledge is a suit for money lent. The period of limitation is three years from the time the loan is made. YELLAPPA *v.* DESAYAPPA (1906).

I. L. R. 30 Bom. 21

——— *Malikana, right to recover—Limitation Acts (XIV of 1859 and XV of 1877), Sch. II, Art. 132—Recurring cause of action under the present law, but not under the old law.*—Under the former law of limitation the right to receive *malikana* was treated as an interest in land and the claim would be barred, if not made within 12 years after the last receipt by the proprietor. A plaintiff, who had never been in the habit of receiving any *malikana* from the year 1845 up to the date of the suit (1902) was barred, as under Act XIV of 1859 the *malikana* was treated as an interest in land and the right to sue accrued from the time of the accrual of the cause of action. A suit for *malikana* when governed by the present Limitation Act would not be barred, because under Art. 132 of Sch. II the right to receive *malikana* is a recurring right and the right to sue accrues when the money sued for falls due. Payment of *malikana* to other *maliks* had not the effect of saving the plaintiffs' right to recover *malikana*. JAGARNATH PERSHAD SINGH *v.* KHARACH LAL (1905) . . 10 C. W. N. 151

——— *Old and unclaimed deposits in High Court and Intestates' Estates Act (XXV of 1866)—Money in deposit in Court—Limitation Act (XV of 1877), Arts. 178 and 179 (4)—Application by judgment-creditor for payment of fund in Court—Limitation—Money, if realised in execution of decree—"Step in aid of execution".*—An application by a judgment-creditor for payment of

LIMITATION—*concluded.*

a fund or money in Court attached, would be "a step in aid of execution" within the meaning of Art. 179 (4) of Sch. II of the Limitation Act, if the money or fund of which payment is sought has not been realised in execution as the result of the attachment. Such an application would be governed by Art. 178 of Sch. II of the Limitation Act. Application by a judgment-creditor for payment of money already realised in execution for him cannot be barred except under Act XXV of 1866. Where a fund standing to the credit of a suit was directed to be paid to some of the parties in the suit, *Held*, that no bar of limitation attached to their application for drawing out the same, although made 15 years after the order for payment. *Hem Chunder Chowdry* v. *Brojo Soondury Dabee, I. L. R. 8 Calc. 89*; and *Fazal Imam* v. *Metta Sing, I. L. R. 10 Calc. 549*, referred to. APURBA KRISHNA RAY *v.* CHUNDERMONEY DEBI (1905).

10 C. W. N. 354

——— *Suit—Decree—Suit on decree barred by limitation—Neglect to execute decree in suit for possession—Effect of barred decree—Former suit relating to land.*—The plaintiffs instituted a suit against the defendants for recovery of possession of certain immoveable property and obtained a decree, but they neither executed the decree, nor obtained possession amicably, and allowed the decree to become barred by limitation. *Held*, that the plaintiffs were not entitled to institute a fresh suit upon the same cause of action on which the former suit had been founded and to rely upon the decree and to seek to recover possession of the same property upon the footing thereof. OMAN SHEIKH *v.* HALAKURI SHEIKH (1905) I. L. R. 33 Calc. 679

LIMITATION ACT (XIV OF 1859).

——— **s. 1 (15) and s. 18**—*Mortgage—Suit for redemption—Limitation.*—The plaintiff instituted, on the 7th of June 1899, a suit for redemption of an alleged usufructuary mortgage executed on the 14th of August 1781 for a term of 70 years. *Held*, that the suit was barred by limitation under s. 1 (15) and s. 18 of Act XIV of 1859. *Luchmee Buksh Roy* v. *Runjeet Ram Panday, 13 B. L. R. 177*, and *Fatimat-ul-nissa Beyum* v. *Soondar Das, L. R. 27 I. A. 103*, referred to. AKBAR HUSAIN KHAN *v.* IZZAT-UN-NISSA (1906) . I. L. R. 28 All. 333

LIMITATION ACT (XV OF 1877).

——— **s. 2 and Sch. II, Art. 118**—*Act IX of 1871, Sch. II, Art. 129—Acquisition of title by apparent adoption not set aside within 12 years under Act IX of 1871—Suit for possession after Act XV of 1877 in force—Res judicata—Decision in former suit—Civil Procedure Code, s. 13.*—Under the ruling in the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy Chowdhry, L. R. 13 I. A. 84*: *I. L. R. 13 Calc. 308*, and the other cases which followed it, the immunity gained by the lapse of 12 years after the date of an apparent

LIMITATION ACT (XV OF 1877)—*continued.*

adoption does not amount to an acquisition of title within the meaning of s. 2 of the Limitation Act (XV of 1877). And this is so whether the alleged adoption was or was not an apparent adoption to which the ruling in the above case would apply, if the Limitation Act IX of 1871 were now in force. The defendant alleged that in 1858 he had been adopted by a Hindu widow, a taluqdar in her own right, to whom a *sanad* had been granted and whose name had been entered in lists 1 and 2 under Act I of 1869. In 1873 he brought a suit against her for possession of the taluq in which the question of the validity of the adoption, which was denied by the widow, was the main issue and was decided in 1878 against the present defendant, who preferred an appeal to the Privy Council, which was dismissed on his failure to deposit security for costs. The widow died on 13th November, 1893. On 27th May, 1899, the plaintiff, who had attained his majority in June, 1896, brought a suit for possession of the taluq claiming to succeed as next heir of his grandfather, who was the eldest brother of the widow. The defendant, who was in possession, set up his title under the adoption. *Held*, by the Judicial Committee that the suit was not barred by limitation. *Quære*, whether the decision in 1878 in the former suit that the adoption was invalid was not *res judicata* in the present suit under s. 13 of the Code of Civil Procedure (Act XIV of 1882). TIRBHUWAN BAHADUR SINGH *v.* RAMESHAR BAKHSH SINGH (1906).

I. L. R. 28 All. 727
s.c. L. R. 33 I. A. 156
10 C. W. N. 1065

——— s. 4.

See PAUPER . **I. L. R. 33 Calc. 1163**

——— s. 5—*Limitation—Appeal not presented within time—"Sufficient cause"—Appellant misled by his legal adviser as to course to be followed.—Held*, that when a client *bonâ fide* accepts the advice of counsel as to the proper procedure to adopt in the course of limitation and, misled by that advice, fails to file an appeal within time, he is entitled to the benefit of s. 5 of the Limitation Act, 1877. *Wazir Ali Khan* v. *Zainab*, *Weekly Notes, 1903, p. 32*, followed. KUBA MAL *v.* RAM NATH (1906) . . . **I. L. R. 28 All. 414**

——— s. 5—*Admission of appeal after prescribed time—Application for excuse of delay—Practice.*—To entitle a person to succeed on an application to excuse delay in presenting an appeal he must satisfy the Court that he had sufficient cause for not presenting an appeal within the prescribed period. When the time for appealing is once passed, a very valuable right is secured to the successful litigant: and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages, which he has obtained. KARSONDAS DHARAMSEY *v.* BAI GUNGABAI (1905).

I. L. R. 30 Bom. 329

LIMITATION ACT (XV OF 1877)—*continued.*

——— ss. 5 and 12.

See CIVIL PROCEDURE CODE.

——— s. 7—*Evidence as to date of plaintiff's birth.*—Where a question of limitation depended under s. 7 of the Limitation Act, 1877, on the plaintiff's attainment of majority within three years next before suit, their Lordships, while fully recognizing that in India it is difficult to prove such facts as the date of birth after a lapse of many years. *Held*, that the amount of evidence required must nevertheless be such as to carry reasonable conviction to the mind. ARA BEGUM *v.* NANHI BEGUM (1906).

L. R. 34 I. A. 1
s.c. I. L. R. 29 All. 29

——— s. 19—*Requisites of a valid acknowledgment—Transfer of Property Act (IV of 1882), s. 55 (5) (d)—Where no contract to the contrary, liability to pay public charges attaches to vendee on the passing of property—Condition precedent to liability.*—Under s. 55 (5) (*d*) of the Transfer of Property Act, the liability of the vendee to pay the public charges on the property sold attaches in the absence of a contract to the contrary, as an incident of the transfer and is complete when the property passes. Where the adjustment of matters, which form part, but are not the essence and substance of the contract, cannot be carried out in the mode contemplated, the Court will do whatever may be right and proper to effect such an adjustment itself. *Dinham* v. *Bradford*, *L. R. 5 Ch. App. 519*, referred to. Where a deed of sale provides that the vendee shall pay "the amount due, as per sub-division of the peshkush due to Government" and the deed contains no other words to show that the sub-division was a pre-requisite to the vendee's liability, the mere use of the words *as per sub-division* does not make it such and, where no sub-division is effected, and the vendor pays the whole peshkush, the Court will ascertain, as between the vendor and vendee, the proportion payable by the latter and direct payment thereof. An acknowledgment of a conditional liability will not, under s. 19 of the Limitation Act, give a fresh start as long as the condition remains unfulfilled. There must be an unqualified admission or an admission qualified by a condition, which is fulfilled. ARUNACHELLA ROW BAHADUR *v.* RANGIAH APPA ROW BAHADUR (1906) . . . . **I. L. R. 29 Mad. 518**

——— s. 19—*Acknowledgment of debt—Promise to pay implied—Acknowledgment of right to have accounts settled—Debtor and creditor—Debtor appointed executor of will of creditor—Suit to recover balance of account—Limitation Act, Sch. II, Arts. 57, 85—Question of fact or law—Concurrent findings—Ground of special appeal.*—An acknowledgment of liability, should the balance turn out to be against the person making it, is a sufficient acknowledgment under s. 19 of the Limitation Act (XV of 1877), and there is no distinction in this respect between the English and the Indian law. *Sitayya* v. *Rangareddi*, *I. L. R. 10 Mad. 259*, *Prance* v. *Sympson*, *1 Kay 678*, and *Banner*

LIMITATION ACT (XV OF 1877)—*continued.*

v. *Berridge, L. R. 18 Ch. D. 254 : 50 L. J. Ch. D. 680,* approved. An unconditional acknowledgment implies a promise to pay, and the same meaning attaches where there is an acknowledgment of a right to have accounts settled, and no qualification of the natural inference that, whoever is the creditor, shall be paid when the condition is performed by the ascertainment of a balance in favour of the claimant. *In re Rivers Steam Navigation Company, L. R. 6 Ch. App. 822, 828,* followed. The respondent was named as one of the executors of the will of a creditor represented by the appellant, and was one of the applicants for probate. In the probate proceedings in answer to an objection that he was indebted to the estate, the respondent in a petition signed by him, stated that "for the last five years he had open and current accounts with the deceased, the alleged indebtedness does not affect his right to apply for probate" *Held,* a sufficient acknowledgment within s. 19 of the Limitation Act. The application for probate was rejected on the ground that the applicants were not legally appointed executors. The defendant admitted having intermeddled with the estate of the testator, but the Courts in India concurrently found that he did not do so for the reason that as he had not been duly appointed executor he could not have so intermeddled as to make himself responsible as executor. *Held,* that this decision was not a question of fact, but one of law and was therefore open to reconsideration by the Judicial Committee, on appeal. MANIRAM SETH *v.* SETH RUPCHAND (1906) . . . I. L. R. 33 Calc. 1047
s.c. 10 C. W. N. 874
s.c. L. R. 33 I. A. 165

——— s. 19—*Acknowledgment by Receiver—Receiver, if agent—Admission—Estoppel—Bond fide prosecution of claim in administration suit—Claimant directed to institute fresh suit—Limitation—Exclusion of time.*—A Receiver appointed in an administration suit instituted by a creditor of a deceased person against his executor is not an agent of the executor within the meaning of s. 19, Limitation Act. He is the agent and an officer of the Court. But when in such a suit another creditor of the estate applied to rank as such and the Receiver submitted a statement in the presence of the executor admitting the debt due to the applicant, but the Court, after some time, directed the applicant to bring a fresh suit: but on the suit being instituted he was met with the plea that the claim was barred by limitation. *Held,* that in the face of the admission made in his presence the executor was estopped from setting up the Statute of Limitation as a bar. That, in any case, s. 14 of the Limitation Act applied and the time during which the plaintiff was *bond fide* prosecuting his claim in the administration suit should be excluded in computing the period of limitation. BAIJ NATH RAM GOENKA *v.* HEM CHUNDER BOSE (1906). . 10 C. W. N. 959

——— ss. 19 and 22—*Acknowledgment—Party defendant, addition of—Mortgagee—Suit—Release of a portion of mortgaged property, validity of—Release in writing—Registration Act (III of 1877), s. 17—Attestation, whether assent.*—An acknowledgment of a debt to be operative under s. 19 of the Limitation Act must be addressed or communicated to the creditor or to some one on his behalf. *Mylapore* v. *Yeokay, L. R. 14 I. A. 168 : I. L. R. 14 Calc. 301,* followed ; and *Mahalakshmi Bai* v. *Firm of Nageshwar, I. L. R. 10 Bom. 71, Sukhamoni* v. *Ishan Chunder, L. R. 25 I. A. 95 : I. L. R. 25 Calc. 814, Madhusudan* v. *Brujanath, 6 B. L. R. 299, Durgopal* v. *Kashee Ram, 8 W. R. 3,* and *Nizamudin* v. *Muhammad Ali 4 Mad. H. C. 385,* referred to. Where a Court adds a person as a defendant to the suit not upon its own motion, but upon an application by the plaintiff, s. 22 of the Limitation Act does apply and the suit as against the added defendant shall be deemed to have been instituted, when he was so made a party. *Girish Chunder* v. *Dwarkanath, I. L. R. 24 Calc. 640,* and *Fakera Pasban* v. *Bibee Azimunnissa, I. L. R. 27 Calc. 540,* distinguished. Where subsequent to the date of a mortgage, different persons had become interested in different fragments of the equity of redemption, all that the owner of any portion of the equity of redemption is entitled to ask is, that not more than a rateable part of the mortgage debt should be thrown upon the property in his hands. The mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises, because by reason of their own laches they have lost their remedy against the remainder. *Hari Kissen* v. *Valiat Hossein, I. L. R. 30 Calc. 755,* and *Surjiram* v. *Barham Deo, 2 K. L. J. 202,* referred to. Where, therefore, a purchaser of a portion of the equity of redemption is added as a party (defendant) not by the Court, but upon an application by the mortgagee after the prescribed period of limitation, although the mortgage suit is barred as against the added defendant, yet such mortgagee is entitled to succeed in respect of a proportionate part of his claim as against the remaining owners of the equity of redemption. *Ram Sebuk* v. *Ram Lall, I. L. R. 6 Calc. 815,* and *Ram Doyal* v. *Junmenjoy, I. L. R. 14 Calc. 791,* distinguished. A release, when in writing, in order to be operative in law, must be registered under s. 17 of the Registration Act, where the amount of the claim to interest in immoveable property, which is extinguished by the release, is of the value of one hundred rupees or upwards. *Safdar Ali* v. *Lachman Das, I. L. R. 2 All. 554, Basawa* v. *Kalkapa, I. L. R. 2 Bom. 489, Bhyrub* v. *Kaleechunder, 16 W. R. 56,* and *Nandalal* v. *Gurditta, 2 B. L. R. 615,* referred to. A mere attestation of a deed does not necessarily import an assent to all the recitals contained therein. *Chunder Dutt* v. *Bhagwat Narain, 3 C. W. N. 207,* followed. A mortgagee can not release from his claim a portion of the properties comprised in his security so as to prejudice the rights of others, who might have already acquired an interest in the released portion. *Surjiram* v. *Barham Deo, 2 C L. J. 202,* and *Surjiram* v. *Barhamdeo, 1 C. L. J. 3357,* followed. *Jai Gobind* v. *Jairam, 18 All W. N. 420,* and *Sheo Prosad* v. *Behari Lal, I. L. R. 25 All. 79,* dissented from. IMAM ALI *v.* BAIJ NATH RAM SAHU (1906) . I. L. R. 33 Calc. 613
s.c. 10 C. W. N. 551

LIMITATION ACT (XV OF 1877)—*continued.*

——— **s. 20**—*Mortgage – Part payment—Payment by predecessor in interest.*—The words of s. 20 of the Limitation Act are general and there is nothing in it to indicate that the new period of limitation created by it is only to operate against the person making the payment. Where a payment of part of the principal is made by a mortgagor, who was at the time liable for the debt, and the fact of the payment appears in his hand-writing, the new period of limitation created by the section would also take effect as against the purchaser, before the payment was made, of the equity of redemption in the mortgaged property under a money decree made against the mortgagor, whether the purchase was of the whole or only of part of such property. *Krishna Chandra Saha* v. *Bhairab Chandra Saha, I. L. R. 33 Calc. 1077*, followed. *Newbould* v. *Smith, 33 Ch. D. 127 : s.c. L. R. 14 App. Cas. 423*, referred to. DOMI LAL SAHU *v.* ROSHAN DOBAY (1906) . . . . **I. L. R. 33 Calc. 1278**

s. 20—*Payment of interest as such—Payment must be of such a nature as to be a good defence to an action for the amount.*—Where the payee of a promissory note was put in possession of certain lands under an agreement that he was to take the produce of the land as interest, such receipt of produce will be a payment of interest as such sufficient to satisfy the requirements of s. 20 of the Limitation Act, as it will be a good defence to an action by the payee for the interest. The payment contemplated by s. 20 need not necessarily be in money, but must be of such a nature as to be a good defence to an action for the amount due. *Kollipara Pullamma* v. *Maddula Tatayya, I. L. R. 19 Mad. 340*, followed. *Kariyappa* v. *Rachappa, I. L. R. 24 Bom. 493*, referred to. MYLAN *v.* ANNAVI MADAN (1905) . . **I. L. R. 29 Mad. 234**

——— **s. 20**—*Limitation—Execution of decree—Decree payable by instalments—Default in payment of instalments—Civil Procedure Code, s. 257A*—A decree for sale on a mortgage made the amount due thereunder payable by instalments with a condition that, if default were made in payment of any instalment, the decree-holder might execute for the whole amount at once. Default was made, and the decree-holder exercised his option and obtained an order absolute for recovery of the whole amount due under the decree. On the 23rd of February, 1901, the decree-holder applied for execution in respect of the whole amount due and for sale of the mortgaged property. That application was, however, dismissed on the 15th May, 1901, for default of prosecution. On the 1st of July, 1904, the decree-holder again applied for execution. *Held* that, execution of the decree was barred by limitation, and that the decree-holder could not under the circumstances pay in aid two payments of R150 and R 0 alleged to have been received on the 11th of May, 190 , and the 15th of July, 1901, respectively. *Shankar Prasad* v. *Jalpa Prasad, I L. R. 16 All. 371*, distinguished. BHAGWAN DAS *v.* JANKI (1905).

I. L. R. 28 All. 249

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——— **s. 22.**

See HINDU LAW.

I. L. R. 33 Calc. 1079

See MESNE PROFITS.

I. L. R. 33 Calc. 329

——— **Sch. II, Arts. 10 and 120**—*Limitation—Suit for pre-emption—"Physical possession" Right of pre-emption not a purely personal right.*—The term "physical possession," as used in Art. 10 of the second schedule to the Indian Limitation Act, 1877, cannot apply to property which is in the possession of tenants. To a suit for pre-emption of such property, Art. 120 applies. *Betul Begam* v. *Mansur Ali Khan, I. L. R. 24 All. 17*, followed. *Held*, also, that the right of pre-emption being a right incident to or arising out of the ownership of land, the successor in title of a person in whose favour such right has arisen is not debarred from suing to enforce it by the fact only that his predecessor has not done so. *Muhammad Yusuf Ali Khan* v. *Dal Kuari, I. L. R. 20 All. 149*, followed. KUNSILLA KUNWAR *v.* GOPAL PRASAD (1906).

I. L. R. 28 All. 424

——— **Sch. II, Art. 14.**

See ESTATES PARTITION ACT (BENGAL ACT VIII OF 1876), s. 116.

I. L. R. 33 Calc. 693

——— **Sch. II, Art. 58**—*Suit to recover the value of hundies given as a loan—Limitation—Terminus a quo.—Held*, that the mere transfer of hundis for the purpose of making a loan of their value, when realized, does not amount to a loan, until money has been realized by the transferee. *Garden* v. *Bruce, L. R. 3 C. P. 300*, referred to. KOMAL PRASAD *v.* SAVITRY BIBI (1905).

I. L. R. 28 All. 54

——— **Sch. II, Arts. 62, 97, 116**—*Transfer of Property Act (IV of 1882), ss. 55 (2) and 108 (c)—Art. 116, Sch. II of the Limitation Act will apply only when the transaction is one to which s. 55 (2) or 108 (c) of the Transfer of Property Act will apply and a covenant for title or quiet enjoyment can be implied.*—The first defendant, in September 1897, granted, in consideration of an advance, a registered karar to *P*, the predecessor in title of the present plaintiff, in the following terms: "Deed of consent or permission granted to . . . . . by . . . . . In consideration of this amount, the trees standing . . . . . shall be cut down at your expense during a period of 6 years from this date, with the exception of teak and blackwood. For every cart-load of timber so removed . . . . . you are to pay a kuttikanam of R2-4-0 and on those timber, the seal of the Etam shall be impressed without delay . . . . . during the period of 6 years, the Etam shall not grant any permission to others to cut trees . . . . . you have the right to cut down trees and none whatever to the land." The first defendant and the other defendants

LIMITATION ACT (XV OF 1877)—*continued.*

formed a Tarwad, and in a suit brought on behalf of the Tarwad against *P* and the first defendant, it was declared that the karar was not binding on the Tarwad and *P* was restrained from cutting timber. The present suit was instituted by *P* to recover personally from the first defendant and from the Tarwad properties the amount advanced with interest as damages:—*Held*, that the suit so far as the Tarwad properties were concerned was *res judicata* by reason of the decision in the previous suit. *Held* also, that the suit as against the first defendant was barred by limitation. The article applicable to the suit is either Art. 62 or Art. 97 of Sch. II of the Limitation Act. The document is not a sale or lease of immoveable property within the definition of those terms in the Transfer of Property Act and a covenant for title or for quiet enjoyment cannot be implied under s. 55 (2) or s. 108 (*c*) of the Act. Art. 116 of Sch. II of the Limitation Act does not apply to the case. The document did not create a mortgage or charge on immoveable property. It is no more than an exclusive license to cut trees. A document may create an interest in land and bring it within the provisions of the Registration Act. The covenant for title will not necessarily be implied in such cases, unless it is one of the transactions in which a covenant can be implied under the Transfer of Property Act. *Seeni Chettiar* v. *Santhanathan Chettiar, I. L. R. 20 Mad. 58*, followed. MAMMIKUTTI *v.* PUZHAKKAL EDOM (1906).

I. L. R. 29 Mad. 353

——— **Sch. II, Arts. 62, 120, 132.**
See MORTGAGE . **I. L. R. 33 Calc. 92**

——— **Sch. II, Art. 91.**
See HINDU LAW.

——— **Sch. II, Arts. 91, 141.**
See HINDU LAW.

I. L. R. 33 Calc. 257

——— **Sch. II, Arts. 99 and 132**—*Suit for contribution—Annuity charged on land—Adverse possession.*—Where several properties are liable for the payment of an annuity, which has been discharged by the owner of one of such properties, a suit for contribution, being a suit to enforce payment of money charged upon land, is governed by Art. 132 and not by Art. 99 of the second schedule to the Limitation Act. *Bhagwan Das* v. *Hardin. I. L. R. 26 All 227*, followed. The plaintiff's property had been sold in execution of the annuitant's decree on the 20th March, 1899. He derived his title from one *L. G.*, who entered into possession on the decease of his alleged wife, *H. B.*, in the year 1867. In 1868 *L. G.* executed a mortgage in favour of the plaintiff's predecessors, and the latter, after suing for sale, purchased the mortgaged property and entered into possession in 1878. Subsequently, in a suit brought by the plaintiff's predecessors for the redemption of a mortgage executed by *H. B.* in 1865, it was decided that this latter mortgage could not be redeemed, because *H. B.* was not the wife of *L. G.*

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and that nothing, therefore, passed to the mortgagees of the 1868 mortgage. In the present appeal the plea was raised that the plaintiff acquired no charge over the appellant's property. *Held*, that the charge subsisted, and, even if *L. G.* had no interest, which he could pass to the plaintiff, the latter had acquired a good title by adverse possession. YAKUB ALI KHAN *v.* KISHAN LAL (1906) . **I. L. R. 28 All. 743**

——— **Sch. II, Art. 110**—*Rent in arrear from date on which it is due by contract or custom, when such rent ascertained, and not in dispute.*—Rent, when the amount is ascertained, is in arrear, within the meaning of Art. 110 of Schedule II of the Limitation Act from the date on which it is due by express contract or custom irrespective of the end of the fasli or of the exchange of pottah and muchilika. Where the melawaram share due to the landlord is payable by custom as soon as the harvest is over, the rent is ascertained and payable at the end of the harvest and a suit for rent will be barred, if not brought within three years of such date. *Rangayya Appa Rao* v. *Bobba Sriramulu, I. L. R. 27 Mad. 143*, distinguished. Although tender of a pottah is a condition precedent to proceedings for the recovery of rent, there is nothing in the Rent Recovery Act or the Limitation Act to make the date of such tender the starting point of limitation in such cases. ARUNACHELLAM CHETTIAR *v.* KADIR ROWTHEN (1905).

I. L. R. 29 Mad. 556

——— *Applicability of Limitation Act—Mamlatdars' Courts Act (Bombay Act III of 1876), s. 17—Possessory suit—Decision—Duty of the Mamlatdar to order village officers to give effect to his order—Duty, absolute and unqualified.* Where a Mamlatdar's decision awards possession, s. 17 of the Mamlatdar's Courts Act (Bombay Act III of 1876) imposes on him the duty to issue an order to the village officers to give effect thereto. The duty is in no sense conditional on an application being made to the Mamlatdar for the purpose; it is absolute and unqualified. Where such imperative duty is imposed upon a Court, then the Limitation Act (XV of 1877) has no application. *Kylasa Goundan* v. *Ramasami Ayyan, I. L. R. 4 Mad. 172*, *Vithal Janardan* v. *Vithoji-ow Putlajiraw, I. L. R. 6 Bom. 586*, *Ishwardas Jagjiwandas* v. *Dosibai, I.L.R. 7 Bom. 316*, and *Devidas Jagjivan* v. *Pirjada Began, I. L. R. 8 Bom. 377*, followed. BALAJI *v.* KUSHA (1906).

I. L. R. 30 Bom. 415

——— **Sch. II, Arts. 111, 132**—*Art. 132 applies to suits to enforce the charge created by s. 55 of the Transfer of Property Act—Transfer of Property Act (IV of 1882), s. 55.*—The statutory charge, which an unpaid vendor obtains under s. 55 of the Transfer of Property Act, is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor. *Webb* v. *Macpherson, I. L. R. 31 Calc. 57*, referred to and applied. The article of the Limitation Act applicable to a suit to enforce such charge is Art. 132 of Sch. II and not Art. 111.

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Natesan Chetti v. *Soundararaja Ayyangar, I. L. R. 21 Mad. 141*, overruled. *Avuthala* v. *Dayumma, I. L. R. 24 Mad. 238*, overruled. *Subramani Ayyar* v. *Poovan, I. L. R. 27 Mad. 28*, overruled. RAMAKRISHNA AYYAR *v.* SUBRAHMANIA AYYAN (1905) . . . . **I. L. R. 29 Mad. 305**

——— **Sch. II, Arts. 113, 120, 144, 178**—*Suit for possession of land on the basis of award—Award—Suit—Arbitration—Effect of omission to sue to enforce or to file award—Civil Procedure Code (Act XIV of 1882), s. 525—Merger of claim in award.*—A suit for recovery of possession of land on declaration of the plaintiff's right thereto on the basis of an award made by arbitrators appointed by the parties is one to which Art. 144 of the Second Schedule of the Limitation Act applies and may be brought within 12 years from the date of the award. Such a suit cannot be regarded as a suit for the specific performance of a contract, and neither Art. 113 nor Art. 120 nor Art. 178 of Sch. II of the Limitation Act can apply to it. A valid award is operative even though neither party has sought to enforce it by suit or by application under s. 525 of the Code of Civil Procedure. *Per* MOOKERJEE, *J.*—As the ordinary rule, a valid award operates to merge and extinguish all claims embraced in the submission, and after it has made the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. *Sornavalli Ammal* v. *Muthayya Sastrigal, I. L. R. 23 Mad. 593, Sheo Narain* v. *Beni Madhab, I. L. R. 23 All. 285*; *Muhammad Newaz Khan* v. *Alam Khan, I. L. R. 18 Calc. 414, L. R. 18 I. A. 73*; *Krishna Panda* v. *Balaram Panda, I. L. R. 19 Mad. 290*; *Sukho Bibi* v. *Ram Sukh Das, I. L. R. 5 All. 263, Raghubar Dial* v. *Madan Mohan Lal, I. L. R. 16 All. 3, Wood* v. *Griffith, 1 Swanst 438*: *18 R. R. 18, Commings* v. *Heard, L. R. 4 Q. B. 669, Clegg* v. *Dearden, 12 Q. B. 576*: *76 R. R. 360, Jafri Begam* v. *Syed Ali Raza, I. L. R. 23 All. 383*: *L. R. 28 I. A. 111*, and *Rani Bhagute* v. *Rani Chandan, I. L. R. 11 Calc. 386*: *L. R. 12 I. A. 67*, referred to. BHAJAHARI BAFIKYA *v.* BEHARY LAL BASAK (1906). **I. L. R. 33 Calc. 881**

——— **Sch. II, Art. 132.**

See LIMITATION.

——— **Sch. II, Art. 134.**

See DEBUTTER.

——— **Sch. II, Art. 134**—*Applies only when absolute property sold—Malabar Law—'Anubhavam' grants, meaning of—Whether the use of the word creates an irredeemable tenure depends on the particular instrument in each case.*—A stipulation in a kanom deed that a certain amount in grain or money is granted to the mortgagee as anubhavam does not necessarily create an irredeemable tenure. The word 'Anubhavam' will create an irredeemable tenure only when used with reference to the tenure itself, but when used with reference to the allowance

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such allowance will be perpetual, but not the tenure Whether, in any particular case, the word creates an irredeemable tenure or only a perpetual rent charge in respect of the allowance must be decided on the language of the document. If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor, and the rest of the produce is given as 'Anubhavam,' an irredeemable tenure will be created but, otherwise, if the amount of the grant is fixed and the rest is reserved as rent. *Theyyan Nair* v. *The Zamorin of Calicut, I. L. R. 27 Mad. 202*, referred to and distinguished. Art. 134 of Sch. II of the Limitation Act applies only to cases where the vendor purports to sell the property as his absolute property and the vendee purchases it as such. *Radanath Das* v. *Gisborne, 14 M. I. A. 1 at p. 19*, referred to and followed. VYTHILINGAM PILLAI *v.* KUTHIRAVATIAH NAIR (1906) . **I. L. R. 29 Mad. 501**

——— **Sch. II, Art. 142**—*Adverse possession—Cause of action—Title—Specific Relief Act (I of 1877), s. 9.*—The plaintiffs having been dispossessed of certain lands by the defendants in 1894 and 1896 in execution of decrees under s. 9 of the Specific Relief Act, instituted this suit in 1901 to recover possession of those lands. The suit was dismissed by the Courts below on the ground that the claim was barred by limitation, the plaintiffs having failed to prove possession within 12 years antecedent to the institution of the suit. *Held*, that, if the title was with the plaintiffs, their possession during the interval between the time when they ousted the defendants and the time when the latter recovered possession by virtue of the decree under s. 9 of the Specific Relief Act, should be regarded as the possession of the rightful owner, and not of trespassers, and therefore there would be no limitation against the plaintiffs' claim. *Mamtazuddin Bhuian* v. *Barkatulla, 2 R. L. J. 1*, and *Protap Chandra Chatterjee* v. *Durga Charan Ghose, 9 C. W. N. 1061*, referred to. JONAB SHEIKH *v.* SURJA KANTA ACHARYA CHOWDHURY (1907) . . **I. L. R. 33 Calc. 821** s.c. **10 C. W. N. 1081**

——— **Sch. II, Art. 142**—*Suit by vendee for possession of immoveable property—Vendor out of possession—Burden of proof.*—Where a vendee of immoveable property sues for possession, his vendor not having been in possession, at the time of the sale, it lies upon the plaintiff to show that his vendor was in possession at some period within twelve years prior to the date of the suit. *Kashinath Sitaram Oze* v. *Shridhar Mahadeo Patankar, I. L. R. 16 Bom. 343*, followed. And when in such a case the property sold was a share in a house belonging to two separated brothers, it was *held* that the possession of one of the brothers could not be taken to be on behalf of the absent vendor. DEBA *v.* ROHTAGI MAL (1906) . . **I. L. R. 28 All. 479**

——— **Sch. II, Art. 142**—*Possession, suit for—Limitation—Onus—Presumption from title.*—It is for the plaintiff in a suit for ejectment to prove

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possession prior to the alleged dispossession. At the same time, in this question of evidence, the initial fact of the plaintiff's title comes to his aid with greater or less force according to the circumstances established in evidence. *Mohima Chunder Mozoomdar* v. *Mohesh Chundar Neogi, L. R. 16 I. A. 23*, approved. HEMANTA KUMARI DEBI *v.* JAGADINDRA NATH ROY (1906) . . . . . **10 C. W. N. 630**

——— **Sch. II, Art. 142**—*Limitation—Adverse possession—Defaulter—Share of defaulter let on farming lease—Share not claimed on expiry of lease.*—One Mulchand, who owned an eight anna zamindari share in mauza Rajipur, disappeared in 1857 leaving Government revenue unpaid. His share was thereupon made over to Mangu Lal, and afterwards to one Pahalwan Singh, on a farming lease, which expired in 1871. On the expiry of this lease Pahalwan Singh still retained possession of the property, and ultimately in 1891 it was sold in execution of a decree against him and purchased by the predecessor in title of the answering defendants. In 1903 a suit was brought for recovery of possession by the purchasers of Mulchand's rights from his representatives. *Held*, that after 1871 Pabalwan Singh's possession became adverse to Mulchand and the suit was barred by limitation. *Nihal Singh* v. *Dula Singh, Punj. Rec., 1885, C. J. No. 88, p. 71*, approved. MADHO SINGH *v.* SURJAN KUNWAR. (1905) . . . . . **I. L. R. 28 All. 281**

——— **Sch. II,—Arts. 175 (e), 178**—*Art. 178 applies to applications to bring in representatives of deceased respondent in second appeals—Civil Procedure Code (Act XIV of 1882), ss. 582, 587.*—The reference to s. 582 of the Code of Civil Procedure in Art. 175 (*e*) of Sch. II of the Limitation Act does not include by implication second appeals referred to in s. 587 of the Code of Civil Procedure. The period of limitation for bringing in the representative of a deceased respondent in a second appeal is not that prescribed by Art. 175 (*e*) of Sch. II of the Limitation Act, but that prescribed by Art. 178. *Lakshmi* v. *Sri Devi, I. L. R. 9 Mad. 1*, followed. *Vakkalagadda Narasimham* v. *Vabhizulla Sahib, I. L. R. 23 Mad. 498*, overruled. SUSYA PILLAI *v.* AIYAKANNU PILLAI (1906). **I. L. R. 29 Mad. 529**

——— **Sch. II, Art. 178**—*Application in time, if within three years of breach complained of—Court executing decree, powers of—Cannot go behind decree—Civil Procedure Code (Act XIV of 1882), s. 260—Decree for perpetual injunction, execution of.*—Where a perpetual injunction has been granted, on each successive breach of it the decree may be enforced under s. 260 of the Code of Civil Procedure by an application made within three years of such breach under Art. 178, Sch. II of the Limitation Act. The decree-holder is not bound to take action in respect of every petty infringement; and the injunction does not by his inaction become inoperative after three years from the date of the first petty breach so as to disentitle him to take action, where a serious breach is afterwards committed. Where the terms of a decree are clear, the executing Court is bound to give effect to it and cannot read into it limitations gathered from a reference to the records of the suit. VENKATTACHALLAM CHETTY *v.* VEERAPPA PILLAI (1905). **I. L. R. 29 Mad. 314**

——— **Sch. II, Arts. 178 and 179**—*Execution of decree—Limitation—Application to revive former application for execution.*—Where a decree-holder applied for the sale in execution of shares in five villages and shares in two villages were sold and the decree satisfied, but subsequently the sale was held to be a nullity, and the decree-holder made an application to revive the previous application. *Held*, that this was not an application coming under Art. 179 of the second schedule of the Limitation Act, but an application to which Art. 178 applied, the right to apply accruing on the date when the sale was held to be a nullity. *Khairun-nissa* v. *Gauri Shankar, I. L. R. 3 All. 494*, and *Virasami* v. *Athi, I. L. R. 7 Mad. 595*, distinguished. BIHARI LAL MISR *v.* JAGARNATH PRASAD (1906). **I. L. R. 28 All. 651**

——— **Sch. II, Art. 179**—*Rateable distribution of sale-proceeds—Application to withdraw, if step in aid of execution—High Court Rule.*—An order permitting a decree-holder to withdraw moneys awarded to him upon rateable distribution amongst several decree-holders of proceeds realised in execution is in substance as well as in form a ministerial order. The application for withdrawal which the rules of the High Court require to be made to the chief ministerial officer of the Court is not a step taken in aid of execution within the meaning of Art. 179 of Sch. II of the Limitation Act, although it has finally to be submitted to the Judge in charge of the account department. SADANANDA SARMA *v.* KALI SANKAR BAJPAI (1905) **10 C. W. N. 28**

——— **Sch. II, Art. 179**—*Application for leave to bid—Step in aid of execution—Res judicata.*—Where upon an application for execution being made the judgment-debtor made an objection that the decree was barred by limitation, and on the day fixed for the hearing of the objection both the decree-holder and the judgment-debtor were absent and the objection was accordingly dismissed, and the execution proceedings were also struck off, the decree-holder not having paid the process fees, *Held*, that the judgment-debtor was entitled to raise the question of limitation when the decree was again put in execution. *Per* RAMPINI, *J.*—An application by the decree-holder for leave to bid at the sale is not a step taken in aid of execution within Art. 179 of Sch. II of the Limitation Act. *Per* MOOKERJEE, *J.*—It cannot be rightly affirmed as an inflexible rule of law that the granting of leave to a decree-holder to bid at the sale must in every case or may not in any case, amount to an aiding of the execution. When a decree-holder relies upon a previous application to the Court for leave to bid at the sale, as saving limitation, it is not sufficient for him to show that

LIMITATION ACT (XV OF 1877)—*concluded.*

such application was made, but he must further show that the circumstances under which it was made were such that the grant of leave did in fact aid, or would have aided, the execution. That in the present case the application to bid at the sale was not a step in aid of execution. HIRA LAL BOSE *v.* DWIJA CHARAN BOSE (1905) . . . **10 C. W. N. 209**

——— **Sch. II, Art. 179**—*Limitation—Execution of decree—Application not "in accordance with law"—Civil Procedure Code, s. 336—Insolvency.*—Where the judgment-debtor has applied for a declaration of insolvency and proceedings in insolvency are pending on his application, no application for execution can be made against the judgment-debtor's surety. If, therefore, such application is in fact made it will not be an application "in accordance with law" within the meaning of Art. 179 (4) of the second schedule to the Limitation Act, 1877. *Chatter v. Nawal Singh, I. L. R. 12 All. 64,* and *Munawar Husain v. Jani Bijai Shankar, Weekly Notes, 1905, p. 132,* followed. *Held,* also, that the resistance of the decree-holder to the judgment-debtor's application for insolvency will not amount to the taking of a step in aid of execution within the meaning of Art. 179. LANGTU PANDE *v.* BAIJNATH SARAN PANDE (1906). **I. L. R. 28 All. 387**

——— **Sch. II, Art. 179, cl. (5)**—*Notice under s. 248 of the Civil Procedure Code (Act XIV of 1882)—"Date of issuing notice," meaning of—Ministerial Act—Held* (PARGITER, *J., dubitante*), that, in the case of an application for the execution of a decree under Art. 179, cl. (5) of Sch. II of the Limitation Act, time runs from the date when notice is actually issued under s. 248, Civil Procedure Code, and not from the date of the order of the Court to issue such notice. *Kadaressur Sen* v. *Mohim Chandra, 6 C. W. N. 656,* followed. *Damodar v. Sonaji, I. L. R. 27 Bom. 622,* and *Gobind* v. *Dada, I. L. R. 28 Bom. 416,* not followed. RATAN CHAND OSWAL *v.* DEB NATH BARUA (1906). **10 C. W. N. 303**

——— **Sch. II, Art. 179**—*Decree, which leaves matters to be subsequently ascertained.*—A decree, which leaves certain matters to be subsequently ascertained, becomes capable of execution as to them only when they are ascertained; and an application for execution of such decree in regard to such matters will not be barred, if presented within three years of the time when, by such matters being settled, it becomes executable. RATNACHALAM AYYAR *v.* VENKATRAMA AYYAR (1905). **I. L. R. 29 Mad. 46**

LIQUIDATION.

See PRACTICE . **I. L. R. 30 Bom. 173**

LIS PENDENS.

See TRANSFER OF PROPERTY ACT.

LUNACY.

See HINDU LAW. **I. L. R. 28 All. 247**

LUNACY ACT (XXXV OF 1858).

——— **ss. 3, 9, 10**—*Court bound to enquire into existence of property, if denied.*—A petition under Act XXXV of 1858 to declare a person a lunatic, and to appoint a proper manager and guardian, should not be dismissed without enquiry because the counter-petitioner denies the existence of any property belonging to the lunatic. The existence of such property is necessary as a pre-requisite to the Court taking action and must be ascertained by enquiry, where the existence of such is alleged by the petitioner and denied by the other party. LAKSHUMI AMMAL *v.* SEERANGATHAMAL (1905). **I. L. R. 29 Mad. 310**

LUNATIC.

See CIVIL PROCEDURE CODE. **10 C. W. N. 719**

See PRACTICE . **I. L. R. 33 Calc. 1094**

M

MADRAS ACT III OF 1869.

See CRIMINAL PROCEDURE CODE.

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884).

——— **ss. 4-B (1) (b), 4-B (3) (b) 21, 261**—*Supersession of a municipal body under s. 4-B (1) (b) only a suspension—No notice under s. 261 required when the suit is only for injunction—Easements Act (V of 1882), s. 7, ills. (a) and (i)—Right of proprietor on higher level under s. 7, ill. (i), not an easement and does not interfere with the right of lower proprietor to build on his own land under s. 7, ill. (a).*—The 'supersession' of a Municipal Council under s. 4-B (*1*) (*b*) of Madras Act IV of 1884 is only suspension of such body for a limited period and such supersession is different from and has not the effect of a dissolution under s. 4-B (*1*) (*a*). The 'reconstitution' of such a Council under s. 4-B (*1*) (*b*) is the revival of the old corporation and not the creation of a fresh one and all the rights and liabilities of the superseded Council will devolve on the Council so reconstituted as its rightful successor. The notice required by s. 261 of the District Municipalities Act is not necessary, when the suit is for an injunction. The right of the owner of higher land under s. 7, illustration (*i*), of the Easements Act, *i.e.*, that the water naturally rising in, or falling on, such land shall be allowed by the owner of adjacent lower land to run naturally thereto is not a right in the nature of an easement and is subject to the right of the owner of such lower land to build thereon under s. 7, illustration (*a*), of the Act. The owner of

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884)—*concluded.*

the lower land cannot complain of the passage of such water as an injury, but he is not bound to keep open such way and may obstruct it by suitable erections on his land. *Smith* v. *Kenrick, 7 C. B. 515,* referred to. *Rylands* v. *Fletcher, L. R. 3 H. L. 338,* referred to. MAHAMAHOPADYAYA RANGACHARIAR v. MUNICIPAL COUNCIL OF KUMBAKONAM (1906) . . **I. L. R. 29 Mad. 539**

——— s 45—*Contract not signed in accordance with section unenforceable.*—A contract purporting to be made by a Municipality, but not signed by the Chairman or Vice-Chairman and a Councillor as required by s. 45 of Act IV of 1884 is not binding on the Municipality. *Rada Krishna Das* v. *The Municipal Board of Benares, I. L. R. 27 All. 592,* followed. Where the contract is not so signed, the Municipality cannot be rendered liable on the ground of executed consideration. *Young & Co.* v. *The Mayor and Corporation of Royal Leamington Spa, L. R. 8 A. C. 517* followed. RAMASWAMY CHETTY v. MUNICIPAL COUNCIL, TANJORE (1905) **I. L. R. 29 Mad. 360**

——— s. 55—*'Day' what is—Circumstances which determine whether particular days are to be reckoned or omitted.*—The word 'day' in s. 55 of the Madras District Municipalities Act means a duration of 24 hours and the period of 60 days for which the person must have 'held office within the limits' must be held to be 60 entire and unbroken periods, in law, of 24 hours each. It will depend upon the circumstances whether fractions of a day are to be omitted or to be counted as whole days and the cause and character and duration of absence from Municipal limits will determine whether particular days are to be reckoned or omitted. MUNICIPAL COUNCIL OF CUDDALORE *v.* SUBRAHMANIA AYYAR (1905). **I. L. R. 29 Mad. 326**

——— ss. 191, 197—*Market, definition of —Use of, as market, what amounts to.*—Private property is used as a market when it is used as a public place for buying and selling. Where a private market had been ordered to be closed, a person using the place for selling fish and flesh after a license had been refused is guilty of an offence under s. 197 of the Madras District Municipalities Act or, at any rate, of an offence under s. 191. ABU BAKER *v.* MUNICIPALITY OF NEGAPATAM (1905). **I. L. R. 29 Mad. 185**

MADRAS DISTRICT POLICE ACT (XXIV OF 1859).

——— s. 44—*Police constable not returning to duty after expiry of leave, guilty of offence under.*—A police constable, who, having obtained casual leave does not return to duty on the expiry of such leave and stays away without obtaining fresh leave, is guilty under s. 44 of Act XXIV of 1859 of the offence of "ceasing to perform the duties of his office without leave." EMPEROR *v.* RAMASAWMY RAJU (1906) . . . **I. L. R. 29 Mad. 192**

MADRAS REGULATION VII OF 1817.

——— s. 13—*Board of Revenue may appoint hereditary trustees—Religious Endowment Act XX of 1863—Committee appointed under, cannot interfere with existing scheme except for just and sufficient cause—Act does not confer arbitrary power to appoint additional trustees.*—It is competent to the Board of Revenue under s. 13 of Madras Regulation VII of 1817 to appoint hereditary trustees, when such appointment does not interfere with any subsisting rights. Such appointment is not inconsistent with the exercise of superintendence by the Board, and the Board does not thereby relinquish a part of the duty of superintendence vested in them by s. 2. *Venkatesa Nayudu* v. *Shrivan Shatagopa Shri Shatagopaswami, 7 M. H. C. 77,* approved. *Appasami* v. *Nagappa, I. L. R. 7 Mad. 499,* referred to. The Board cannot arbitrarily put an end to an arrangement permanently made by them, but may do so only for just and sufficient reasons. It is not competent to a Temple Committee, under Act XX of 1863, to alter the constitution of the temple management established by the Board and to appoint additional trustees, where some or all of the trustees are hereditary. Act XX of 1863 does not confer on the Committee an unqualified power of adding to the number of trustees sanctioned under an existing scheme, even if such trustees are not hereditary. Such an addition may be made only for just and sufficient cause, which should be fully stated in the Proceedings of the Committee. The negligence or mismanagement of old trustees or any pecuniary benefit to the temple by the new appointments are not just and sufficient causes. Such appointments ought not to be temporary. GANAPATHI AYYAR *v.* VEDAVYASA ALASINGA BHATTAR (1906) . . . **I. L. R. 29 Mad. 534**

MADRAS RENT RECOVERY ACT (VIII OF 1865).

——— ss. 1, 38, 39—*Intermediate landholder tenant for purposes of ss. 38, 39.*—An intermediate landholder liable to pay rent to a superior landlord is a tenant for the purposes of ss. 38 and 39 of the Madras Rent Recovery Act (VIII of 1865) and the opinion of the Full Bench in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi, I. L. R. 27 Mad. 465 at p. 470,* is not in conflict with this view. The true effect of the reference in s. 38 to landholders specified in s. 3 is to exclude landholders specified in the second paragraph of s. 1 of the Act. In a suit under ss. 40 and 50 of Act VIII of 1865, it is not competent to the Revenue Court to decide the question of damages sustained by the tenant by non-performance by the landlord of covenants in the lease. MUTHUSAMI PILLAI *v.* ARUNACHELLAM CHETTIAR (1905) . **I. L. R. 29 Mad. 79**

——— s. 8—*Landlord and tenant—Insertion of unreasonable terms in patta.*—Where a tenant disputes the validity of a transfer made by himself to a third party, it is not open to the landlord to recognise the rights of the transferee, until the transferee establishes his rights in a way which is binding on the original tenant; and the insertion of

MADRAS RENT RECOVERY ACT (VIII OF 1865)—*concluded.*

words in the patta tendered to the tenant recognising the rights of the transferee will be unreasonable. ORR *v.* RAKKUMARATHI (1905).

I. L. R. 29 Mad. 83

——— **s. 9**—*Landlord and tenant—Right to issue patta for unassessed house-site.*—It being common in this country to have trees in backyards forming part of unassessed house-sites, such a circumstance does not amount to a conversion of such site enjoyed free of rent into cultivated land for which rent is payable and no patta can be tendered in respect of such lands. ELUMALAI CHETTIAR *v.* NATESA MUDALIAR (1905) . . **I. L. R. 29 Mad. 81**

——— **s. 40**—*Limitation for suits under s. 40—Right of attachment, when rent is payable in kind—Validity of attachment for arrears due under patta altered subsequently.*—S. 40 of the Madras Rent Recovery Act must be read with s. 51. The word "month" in the former was intended to be equivalent to the 30 days in the latter and suits under s. 40 are within time, if presented within 30 days. Attachment proceedings under the Act may be taken when rent is payable in kind. Where a patta under which an attachment was made, is altered on appeal subsequently, the attachment cannot be upheld even to the extent of the rent in arrears under the altered patta. *Ramachandra* v. *Narayanasami, I. L. R. 10 Mad. 229,* not followed. VAMA DAVA DESIKAR *v.* MURUGESA MUDALI (1905).

I. L. R. 29 Mad. 75

MADRAS REVENUE RECOVERY ACT (MADRAS ACT II OF 1864).

——— **s. 35, cl. 5, and s. 39**—*Certified purchaser at revenue sale can be shown to be only benamidar.*—Benami purchases are common in India and effect is to be given to them according to the intention of the parties, except so far as a positive enactment directs a contrary course. Where land has been sold for arrears of revenue under the Revenue Recovery Act and the name of the purchaser has been published under s. 39 of the Act, such proclamation does not preclude any one subsequently from contending that such purchaser was only a benamidar and the real purchaser was some one else. *Muthuvaiyan* v. *Sinna Samavaiyan, I. L. R. 25 Mad. 526,* followed. *Narayana Chettiar* v. *Chokkappa Mudaliar, I. L. R. 25 Mad. 655,* overruled. NARAYANASAMI PADAYACHI *v.* GOVINDASAMI PADAYACHI (1906) . . . . **I. L. R. 29 Mad. 473**

MADRAS SALT ACT (IV OF 1889).

See CIVIL PROCEDURE CODE.

——— **ss. 16 (a), 18 and 27** *No compensation under s. 18, when license cancelled under s. 27—Civil Procedure Code (Act XIV of 1882), s. 244.*—Where a license has been cancelled under s. 27 of the Madras Salt Act (IV of 1889), the licensee is not entitled to compensation under s. 18 of the Act, but only to the value of the proprietary right under

MADRAS SALT ACT (IV OF 1889)—*concluded.*

s. 16 (*a*) of the Act. Where such licensee has obtained a decree for possession of saltpans in default of payment of proper compensation, it is competent to the Court in execution proceedings to determine the amount so payable; and no separate suit need be brought to determine such amount. SECRETARY OF STATE FOR INDIA *v.* SUBRAYA MUDALIAR (1905).

I. L. R. 29 Mad. 181

MAGISTRATE.

See COMPLAINT.

MAHOMEDAN LAW.

1. ARIAT.
2. DIVORCE.
3. GIFT.
4. MARRIAGE.
5. PRE-EMPTION.
6. WAQF.
7. WAJIB-UL-ARZ.
8. WILL.

See DIVORCE.

See EVIDENCE ACT . **10 C. W. N. 33**

See PRESUMPTION OF DEATH.

I. L. R. 33 Calc. 173

1. ARIAT.

——— *Mutation of names—Ariat.*—A Muhammadan caused mutation of names in respect of certain property to be effected in favour of his wife, and at the same time presented a petition to the Revenue Court, stating that he had transferred his rights and interests to his wife, Habib-un-nissa, and made her his *locum tenens,* but that she had no power to transfer the property in any way, and that she would continue to hold and possess the share for her life; but he executed no formal transfer of the property to his wife. *Held,* this was not a gift, but merely an "*ariat*" and invalid according to the Muhammadan Law. MUMTAZ-UN-NISSA *v.* TUFAIL AHMAD (1905).

I. L. R. 28 All. 264

2. DIVORCE.

——— *Hanafi Sunnis—Divorce—Talak-ul-bain by one pronouncement in the absence of the wife—Execution of talaknama in the presence of the Kazi—Communication of the divorce to the wife—Marz-ul-maut—Death of the husband before expiration of the period of iddat.*—*A,* a Mahomedan belonging to the Hanafi Sunni sect, took with him two witnesses and went to the Kazi and there pronounced but once the divorce of his wife (plaintiff) in her absence. He had a *talaknama* written out by the Kazi, which was signed by him and attested by the witnesses. *A* then took steps to communicate

MAHOMEDAN LAW—*continued.*

2. DIVORCE—*concluded.*

the divorce and make over the *iddat* money to the plaintiff, but she evaded both. *A* died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of *A* and claimed maintenance and residence. *Held*, overruling the contention that the divorce should have been pronounced three times, that the *talak-ul-bidaat* (*i.e.*, irregular divorce) is good in law, though bad in theology. *Held*, further, in answer to the contention that the divorce was not final as it was never communicated to the plaintiff, that a *bain-talak*, such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing." In order to establish *Marz-ul-maut* there must be present at least three conditions:—(1) Proximate danger of death, so that there is, as it is phrased, a preponderance *ghaliba* of *khauf* or apprehension, that is, that at the given time death must be more probable than life: (2) there must be some degree of subjective apprehension of death in the mind of the sick person: (3) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations. Where an irrevocable divorce has been pronounced by a Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat*, she has no claim to inherit to the husband. SARABAI *v.* RABIABAI (1905) . . **I. L. R. 30 Bom. 537**

3. GIFT.

——— *Gift—Mode of making valid gifts either with or without consideration—Bonâ fide intention—Delivery of possession—Gift with reservation by donor of possession and enjoyment of property to himself and wife for their lives.*—By the Mahomedan law a holder of property may in his life-time give away the whole or part of his property, if he complies with certain forms; but it is incumbent upon those, who seek to set up such a transaction, to show very clearly that those forms have been complied with. It may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary) actual payment of the consideration must be proved, and the *bonâ fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must also be proved. *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan*, *L. R. 8 I. A. 291*; *I. L. R. 2 Calc. 184*, followed. In a suit to set aside a deed of gift executed by the plaintiff in favour of the defendant, both being Muhammadans, the Judicial Committee held that the deed, which purported to be a conveyance for value, was a transaction in which no consideration passed or was intended to pass; that in executing the deed the plaintiff did not intend to give the property to the defendant except subject to a reservation of the possession and enjoyment to himself and his wife during their lives, to which the defendant pledged himself; and that the deed was not followed by delivery of possession, but was a fictitious and *benami* deed and was invalid and void. CHAUDHRI MEHDI HASAN *v.* MUHAMMAD HASAN (1905).
10 C. W. N. 706
s.c. L. R. 33 I. A. 68
I. L. R. 28 All. 439

——— *Transfer of possession—Donor and donee living in the same house the subject of the gift—Evidence.*—It is not necessary according to Mahomedan Law that in all cases where a gift of immoveable property is made, the donor should actually and physically vacate the property the subject of the gift. Where the gift was of a house and other immoveable property, and was made by registered instrument and attended by circumstances of great publicity, the fact that the donor, who was the aunt of the donee, never quitted the house, but continued to reside in it with her nephew, was held to be of no effect in the face of the clearly manifested intention of the donor to transfer possession of the house to the donee. *Shaik Ibrahim* v. *Shaik Suleman*, *I. L. R. 9 Bom. 146*, followed. HUMERA BIBI *v.* NAJM-UN-NISSA (1905) . . . . . **I. L. R. 28 All. 147**

4. MARRIAGE.

Marriage—Ghair kuf wife—Custom of exclusion from inheritance—Proof of custom—Entry in wajib-ul-arz—Mortgagee by conditional sale—Mortgagee taking possession without foreclosure proceedings—Trespasser—Suit for ejectment without redeeming—Regulation XVII of 1806.—In a suit by a Muhammadan lady to recover possession as her husband's heir, of his immoveable property, the question arose whether she was a *ghair kuf* wife and so excluded by custom from inheritance as heir to her husband. The only reliable evidence of the custom was the village *wajib-ul-arz*, which stated that "a married wife belonging to a different caste (*ghair kuf*) and an unmarried wife or their descendants" would "be entitled to maintenance" but not "to any share" of the property. The document bore the signature amongst others, of the husband, and commenced with words meaning "by agreement," and so did not purport to be a record of immemorial custom, and the rules of inheritance laid down in it were based, not upon Mahomedan, but upon Hindu, law. *Held*, that in the absence of other evidence the entry in the *wajib-ul-arz* was insufficient to establish the custom. A deed of 11th May, 1871, executed by the husband in favour of a person through whom the defendant made title, hypothecated the village property in suit in consideration of a loan of R2,000, stipulating that, in default of payment, the transaction should be "a complete sale" in 20 years or on the death of the mortgagor,

MAHOMEDAN LAW—*continued.*

4. MARRIAGE—*concluded.*

whichever first occurred. The deed recited and renewed a former deed made in 1866, between the same parties, described as a "mortgage deed by conditional sale" and containing the same terms, except that the period for repayment was five years. The mortgagor died in 1881, and the defendant, the representative of the mortgagee, then took forcible possession without any foreclosure proceedings under Regulation XVII of 1806, the law then in force. *Held*, that the deed of 1874 was a mortgage by conditional sale. There was under it a right of foreclosure on failure of the mortgagor to redeem within the time limited by the terms of Regulation XVII of 1806, but in taking possession as he did the defendant was a mere trespasser and liable to ejectment in this suit. HUB ALI v. WAZIR-UN-NISSA (1906) . . . . **I. L. R. 28 All. 496**
s.c. 10 C. W. N. 778
L. R 33 I. A. 107

——— *Suit for restitution of conjugal rights—Non-payment of dower—Consummation of marriage.*—To a husband's suit for restitution of conjugal rights, the wife pleaded non-payment of dower. To this the husband pleaded consummation of marriage. *Held*, that after consummation of marriage, non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights. *Abdul Kadir* v. *Salima, I. L. R. 8 All. 149, Kunhi* v. *Moidin, I. L. R. 11 Mad. 327*, and *Hamidunnessa Bibi* v. *Zohiruddin Sheikh, I. L. R. 17 Calc. 670*, followed BAI HANSA v. ABDULLA (1905).
I. L. R. 30 Bom. 122

5. PRE-EMPTION.

——— *Pre-emption—Talab-i-ishtishad - Witnesses not specifically invoked.—Held*, that the mere fact that the talab-i-ishtishad is made in the presence of certain persons, who happen to be present at the place, where it is made, is not sufficient to make the demand a good one, unless those persons are specifically called upon to bear witness to the demand being made. *Issur Chunder Shaha* v. *Mirza Nisar Hossein, W. R. 1864, p. 351*, followed. GANGA PRASAD v. AJUDHIA PRASAD (1905).
I. L. R. 28 All. 24

——— *Shafi-i-khalit—Easement—Owner of dominant tenement.*—Under the Mahomedan law of pre-emption the owner of the dominant tenement has in respect of a sale of the servient tenement a right of pre-emption as a *shafi-in khalit*, which is preferable to the right of one, who is merely a neighbour as regards the property sold. *Shaikh Karim Bakhsh* v. *Kamer-ud-din, 1874, All. H. C. p. 377*, and *Chand Khan* v. *Niamat Khan, 8 B. L. R. A. C. 296*, referred to. KARIM v. PRIYO LAL BOSE (1905) . . . **I. L. R. 28 All. 12**

——— *How far Mahomedan Law of pre-emption applicable amongst Hindus—Statement of claim—Meaning and not form of statement to be considered.—Held*, that in the absence of allegation or proof as to any custom different from, or not co-extensive with the Mahomedan law of pre-emption, that must be applied between Hindus. *Jagdam Sahai* v. *Mahabir Prasad, I. L. R. 28 All. 60, Chowdhree Birj Lal* v. *Raja Goor Sahai, All. H. C. F. B. 1866-67, Vol. I, p. 128*, and *Jai Kuar* v. *Heera Lal, All. H. C., 1875, p. 1*, referred to. Further, where the words used were "I have a claim for pre-emption on this house. If any one else purchases it, I shall be put to inconvenience. Go at this very moment and take the money from Shushi Bhusan Sircar and tell Ram Charan and Chakauri Divi to return the house by taking the money. *Held*, that this was a sufficient claim; the concluding portion evincing a desire on the part of the plaintiff to avail herself of her right. If she has merely stated that she had a claim that would not have been sufficient. CHAKAURI DEVI v. SUNDARI DEVI (1905) . **I. L. R. 28 All. 590**

MAHOMEDAN LAW—*continued.*

5. PRE-EMPTION—*concluded.*

——— *Talab-i-mawasibat—Power of general attorney to make the talab-i-mawasibat—Pleading—Practice.*—Where the plaintiff in a pre-emption suit alleged that the first demand of *talab-i-mawasibat* was made for him by the general attorney and the defendant did not deny that the person in question was the general attorney of the plaintiff, but in fact no *mukhtarnama* or copy of it was filed, the original being filed in another appeal then pending before the lower Appellate Court. *Held* that, looking to the pleadings, the lower Appellate Court, if it had any doubt on the point, should either have examined the other record or at least have given the plaintiff an opportunity of filing the *mukhtarnama* or a copy. *Held*, further, that the first demand of *talab-i-mawasibat* can be made by a general attorney. *Abadi Begam* v. *Inam Begam, I. L. R. 1. All. 521*, and *Hari Har Dut* v. *Sheo Prasad, I. L. R. 7 All. 41*, followed. *Musammat Ojheeoonissa Begum* v. *Sheikh Rustam Ali, W. R. 1864, p. 219* referred to. MUNNA KHAN v. CHHEDA SING (1906) . **I. L. R. 28 All. 691**

6. WAQF.

——— *Waqf—Testamentary waqf—Validity—Power of cancellation reserved—Condition as to birth of issue in life-time of testator—Waqf of income—Postponement to life interest of widow—Inheritance on death of widow with life interest—Held*, that a waqf created by a Shia by his will is not invalid on the ground that it is not absolute and unconditional merely because it contains clauses cancelling the will, if any child should be born to the testator in his life-time and reserving to the testator power to cancel or modify any of the conditions of the will. *Baqar Ali Khan* v. *Anjuman Ara Begam, I. L. R. 25 All. 236*, referred to. *Held*, further, that the waqf was not invalid because the testator directed that, after the death of his widow, to whom he gave a life interest, the *income* of the property should be devoted to the purposes of waqf, where it was clear

MAHOMEDAN LAW—*continued.*

6. WAQF—*concluded.*

from other terms of the will that the *corpus* also was to be devoted to the purposes of the waqf. *Held*, further, that the fact that the property did not at once on the testator's death pass to the trustees of the endowment, their enjoyment being postponed to a life interest of the widow for maintenance, did not invalidate the waqf. *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu, I. L. R. 17 Calc. 498*, referred to. *Bagar Ali Khan* v. *Anjuman Ara Begam, I. L. R. 25 All. 236*, discussed. *Held*, further, that the plaintiffs' father having predeceased the widow of their uncle, the testator, to whom a life estate had been given by the will, then if the waqf was invalid and if the inheritance consequently opened upon the death of the widow, still the surviving brother, who was alive at the death of the widow, would succeed to the exclusion of the plaintiffs, his deceased brother's children. *Mussamut Humeeda* v. *Mussamut Buldun* and *the Government*, *17 W. R. 525*, and *Abdul Wahid Khan* v. *Nuran Bibi, I. L. R. 11 Calc. 597*, referred to. MUHAMMAD AHSAN *v.* UMAR DARAZ (1906) . . . . **I. L. R. 28 All. 633**

———*Waqf—Testamentary waqf—Mortgage of waqf property—Inoperative waqf.*—Though *waqf* may be created by a will, it does not follow from this that it must be an operative transaction. ABDUL KARIM *v.* SOFIANNISSA (1906).
I. L. R. 33 Calc. 853

———*Waqfnamah—Suit for setting aside—Substantial dedication—Intention of waqf—Illusory trust—Delivery of possession of wakf property to Mutwalli—Evidence to show that there was no intention to give effect to trusts and that trusts were in fact not given effect to, relevancy of—Waqf of shares in a Company, if valid.*—In a suit for setting aside a *waqfnamah* on the ground that the trusts are illusory and that there has been no substantial dedication to religious and charitable trusts, the question before the Court is whether there was a real intention to give effect to the document as a *waqfnamah*. The intention of the settlor must be gathered from the document itself. If the *waqf* was formally constituted and perfected and established by its terms a substantial charitable trust, it is wholly immaterial, whether its provisions were carried out or not, for that is a matter of breach of trust only. Evidence given to show that it was never intended to give effect to the trusts and that in fact they were not given effect to, is irrelevant in such a suit. Evidence, however, showing the manner in which the document is related to existing facts, *e.g.*, the value and state of the *waqf* properties, is relevant. According to Mahomedan law a *waqf* cannot be created of shares in a Company. *Fatima Bibi* v. *Ariff, 9 C. L. R. 66*, followed. *Sakina Khanum* v. *Luddun Sahiba, App. from O. D. 110 of 1900, 10th June 1902*, dissented from. *Oriental Bank* v. *Gobind Lall Seal, I. L. R. 9 Calc. at p. 607*, referred to. KULSOM BIBEE *v.* GOLAM HOSSEIN CASSIM ARIFF (1905) . . **10 C. W. N. 449**

MAHOMEDAN LAW—*continued.*

7. WAJIB-UL-ARZ.

———*Wajib-ul-arz—Construction of document—Mahomedan Law—"Intiqal."*—Where in a wajib-ul-arz it was recorded merely that "the custom of pre-emption prevails," it was *held* that in the absence of any special custom different from or not co-extensive with the Mahomedan law of pre-emption, the Mahomedan law must be applied. *Ram Prasad* v. *Abdul Karim, I. L. R. 9 All. 513*, followed. The term "*intiqal*" occurring in the pre-emptive clause of a wajib-ul-arz covers all kinds of transfers, mortgages as well as sales. JAGDAM SAHAI *v.* MAHABIR PRASAD (1905).
I. L. R. 28 All. 60

———*Wajib-ul-urz—Owner of isolated plots in a village.*—*Held*, that the owner of isolated plots of land in a village is a co-sharer in the village and may as such possess rights of pre-emption, although he does not own a share in the zamindari of the village and his name is not recorded in the khewat. *Safdar Ali* v. *Dost Muhammad, I. L. R. 12 All. 426*, and *Dakhni Din* v. *Rahim-un-nissa, I. L. R. 16 All. 412*, followed. ALI HUSAIN KHAN *v.* TASADDUQ HUSAIN KHAN (1905).
I. L. R. 28 All. 124

———*Wajib-ul-arz—Construction of document.*—The pre-emptive clause of a wajib-ul-arz was drawn up in the following terms:- "In case of great necessity each co-sharer is entitled to transfer his property as recorded in the *khewat*, and the near co-sharers and the pattidars can claim a pre-emptive right, but out of them the one, who is nearer, will have a prior right to do so." *Held*, that the right of pre-emption only arose on a sale to a stranger. If the sale was to a co-sharer, no right of suit accrued to a nearer co-sharer. JAI DAT *v.* RAM BADAL (1905) . . . . **I. L. R. 23 All. 168**

———*Wajib-ul-arz—Sale of land by Government.*—When Government has acquired land permanently it does not become a co-sharer in the village, to which the land originally appertained, and on a sale thereof the provisions contained in the village wajib-ul-arz, which deal with sales by co-sharers in the village, are not applicable. GAYA SINGH *v.* RAM SINGH (1905).
I. L. R. 28 All. 235

———*Wajib-ul-arz—Pre-emptor accepting a lease of property in suit from the vendee.*—Where in a suit for pre-emption based upon a custom declared in the wajib-ul--arz it was found that the pre-emptor had, with knowledge of his right as pre-emptor, accepted a lease of the land claimed from the vendee, it was *held* that this amounted to such an acquiescence in the sale as would bar the plaintiff's right of suit. KISHAN LAL *v.* ISHRI (1905).
I. L. R. 28 All. 237

———*Wajib-ul-arz—Co-sharer—Owner of plot of grove land.*—*Held*, that a person, who buys a plot of grove land in a village, does not thereby become a co-sharer in the village so as to entitle him

MAHOMEDAN LAW—*continued.*

7. WAJIB-UL-ARZ—*continued.*

to enforce a right of pre-emption under a wajib-ul-arz, which confers such right upon co-sharers. *Dakhni Din* v. *Rahimun—nissa, I. L. R. 16 All. 412*, and *Alt Husain Khan* v. *Tasadduq Husain Khan*, supra *p. 124*, referred to. MUHAMMAD ALI v. HUKAM KUNWAR (1905) I. L. R. 28 All. 246

——— *Wajib-ul-arz—Construction of document—Partition of village into separate mahals.*—In a village, which consisted of two patties or mahals, the wajib-ul-arz recorded a custom of pre-emption to the effect that in the case of sale or mortgage by a shareholder a claim for pre-emption might be brought by (*1*) own brothers and nephews, (*2*) cousins who are co-sharers, (*3*) co-sharers in the patti, and (*4*) shareholders in the village (*hissadaren deh*). The village was subsequently divided into more mahals: but no new wajib-ul-arz was framed—*Held*, that a co-sharer in the village had a right of pre-emption as against a stranger, even though he did not own a share in the mahal in which the property sold was situate. *Dalganjan Singh* v. *Kalka Singh, I. L. R. 22 All. 1*, referred to. JANKI v. RAM PARTAB SINGH (1905).

I. L. R. 28 All. 286

——— *Wajib-ul-arz—Construction of document—"Qimat."—Held*, that the word *'qima'* as used in the pre-emptive clause of a *wajib-ul-arz* is wide enough to include the consideration given for a usufructuary mortgage with possession as well as for a sale. HULASRAI v. RAM PRASAD (1906).

I. L. R. 28 All. 454

——— *Wajib-ul-arz—Construction of document—Custom or contract.*—In a suit for pre-emption two *wajib-ul-arz* were relied upon. The earlier *wajib-ul-arz* of the year 1864 provided that "If a sharer desires to transfer his share, the first right of pre-emption is possessed by his near brother, next by the sharers in the patti and next by the sharers in other pattis, and when all these have declined to take a transfer the sharer may sell to any one he likes." The latter *wajib-ul-arz* of the year 1884 under the head, "custom as to pre-emption" provided that "no such case has as yet occurred: but we acknowledge the right of pre-emption." *Held*, that the *wajib-ul-arz* of 1864 was evidence of the existence of a right existing by custom and the provision in the latter was a recognition by the parties of the custom prevailing under the earlier *wajib-ul-arz*. *Ram Din* v. *Pokhar Singh, I. L. R. 27 All. 553*, followed. DAULAT v. MATHURA (1906) . . . . I. L. R. 28 All. 456

——— *Wajib-ul-arz—Construction of document—Retention of same wajib-ul-arz after division of village into mahals Hissadaran deh and hissadaran patti on the same footing.*—Where a village was divided into three mahals and the new wajib-ul-arz, which was prepared for one of them, *A. M.* was copied verbatim from the wajib-ul-arz of the village before division and clearly put *hissadaran deh* and *hissadaran patti* on the same

MAHOMEDAN LAW—*continued.*

7. WAJIB-UL-ARZ—*concluded.*

footing,—*Held*, that a co-sharer in the mahal *A. M.* had no right of pre-emption in regard to property sold in *A. M.* as against a co-sharer who, though he had no share in the mahal *A. M.*, was a co-sharer in one of the other mahals. *Dalganjan Singh* v. *Kalka Singh, I. L. R. 22 All. 1*, distinguished. SARDAR SINGH v. IJAZ HUSAIN KHAN (1906) . . . . I. L. R. 28 All. 614

——— *Wajib-ul-arz—Inference from entry in previous wajib-ul-arz—Mahomedan Law.*—A village wajib-ul-arz, prepared in the year 1883, contained only the following entry with reference to pre emption :—"Custom of pre-emption :—No pre-emption suit has been instituted, but the custom of pre-emption is accepted." But the wajib-ul-arz of the same village, prepared in 1864, was more explicit. It ran as follows :—"Mention of the right of pre-emption :—When it is desired to transfer a share, the heirs and near brethren have the right first. On their refusal to take, the transferor is competent to sell, mortgage or assign to any one he likes."—*Held*, that in the wajib-ul-arz of 1883 the villagers intended to reproduce—and understood they were in fact reproducing—the custom of pre-emption that prevailed in 1864: that therefore the provisions of the Mahomedan law were not applicable. POKHAR SING v. HUSAIN KHAN (1906).

I. L. R. 28 All. 679

8. WILL.

——— *Will—Construction of document.*—One Muhammad Azim made a will, whereby, after making provision for his widow and daughters, he divided his property between his three sons giving to each certain villages. The gift was *primâ facie* absolute, but the will further provided that none of the sons should have a right to alienate the property devised to him, and that on the death of one of the devisees without issue his share should go to the surviving brothers or brother or his or their heirs. The testator died, leaving surviving him three sons Abdul Qayum and Abdul Kadir by one wife, and Abdul Karim by another. The will was assented to by the heirs of the testator, and the three sons entered into possession of their shares. Then Abdul Kadir died, and his full brother, Abdul Qayum, took possession of his share. *Held*, on a suit by the half-brother for possession of half the share, that according to the Mahomedan law the three devisees took absolutely, and the plaintiff's claim could not be maintained. ABDUL KARIM KHAN v. ABDUL QAYUM KHAN (1906).

I. L. R. 28 All. 342

——— *Signature—Intention.*—Where it was found that a document purporting to be the will of a Muhammadan lady was in fact drawn up in accordance with instructions given by the testatrix to a vakil at a time when the testatrix was competent to make a will, *Held*, that such document was a valid will notwithstanding the absence of the signature of the testatrix. *Parker* v. *Filgate, L. R. 8 P. D. 171. Perera* v. *Perera, 1901, A. C. 354 Allen* v. *Manning*

MAHOMEDAN LAW—*concluded.*

8. WILL—*concluded.*

2 Add. 490, and *Re Taylor, 1 Hagg 641*, referred to. AULIA BIBI *v.* ATA-UD-DIN (1906).
I. L. R. 28 All. 715

MAINTENANCE.

See CIVIL PROCEDURE CODE.
10 C. W. N. 1102

See HINDU LAW . . **10 C. W. N. 1**

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 39 AND 100.

MAL OR LAKHRAJ.

See LANDLORD AND TENANT.
10 C. W. N. 434

MALABAR LAW.

———— *'Anubhavam' grants, meaning of—Whether the use of the word creates an irredeemable tenure depends on the particular instrument in each case—Limitation Act (XV of 1877), Art. 131—Applies only, when absolute property sold.*—A stipulation in a kanom deed that a certain amount in grain or money is granted to the mortgagee as anubhavam does not necessarily create an irredeemable tenure. The word 'Anubhavam' will create an irredeemable tenure only when used with reference to the tenure itself, but when used with reference to the allowance, such allowance will be perpetual, but not the tenure. Whether, in any particular case, the word creates an irredeemable tenure or only a perpetual rent charge in respect of the allowance must be decided on the language of the document. If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as 'Anubhavam,' an irredeemable tenure will be created; but otherwise, if the amount of the grant is fixed and the rest is reserved as rent. *Thayyan Nair* v. *The Zamorin of Calicut, I. L. R. 27 Mad. 202*, referred to and distinguished. Art. 134 of Sch. II of the Limitation Act applies only to cases where the vendor purports to sell the property as his absolute property and the vendee purchases it as such. *Radanath Das* v. *Gisborne, 14 M. I. A. 1 at p. 19*, referred to and followed. VYTHILINGAM PILLAI v. KUTHIRAVATIAH NAIR (1906).
I. L. R. 29 Mad. 541

———— *Effect of gift of property to a female and her children—Such property not assets for the debts of a deceased member.*—A gift of property to a female and some or all of her children by their father or the Karnavan of the Tarwad has not the effect of constituting them into a Tarwad by themselves. They, however, hold the properties so given with the ordinary incidents of Tarwad property and when a member dies, his interest passes by survivorship to the others and is

MALABAR LAW—*concluded.*

not available for attachment at the instance of a decree-holder. *Kunhacha Umma* v. *Kutti Mammi Hajee, I. L. R. 16 Mad. 201*, referred to. KOROTH AMMAN KUTTI *v.* PERUNGOTTIL APPU NAMBIAR (1906) . . **I. L. R. 29 Mad. 322**

———— *Karnavan, right of, to sue a member in possession for maintenance.*—Where properties of a Tavazhi are in the possession of a member other than the Karnavan, the latter cannot sue such member for maintenance, but only for possession of such properties. NAMBIAMUTTIL POKKER *v.* KITHAKKI KUNHIPATUMMA (1905).
I. L. R. 29 Mad. 206

MALICIOUS ARREST.

———— *Not maintainable when arrest ordered by officer invested with discretionary power, before whom the full facts were placed by the defendant.*—An action for malicious arrest is not sustainable, when the defendant has placed all the facts before the officer having the discretionary power to order such arrest and when such officer, with full knowledge of all the facts exercised his discretion and ordered the arrest. In an action for false imprisonment the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause, whereas, in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence. *Hicks* v. *Foulkner, 51 L. J. Q. B. 268*, referred to. THAKDI HAJJI *v.* BUDRUDIN SAIB (1906) . . . **I. L. R. 29 Mad. 208**

MALICIOUS PROSECUTION.

See TORT . . **10 C. W. N. 723**

———— *Suit for damages for malicious prosecution—Commencement of prosecution bonâ fide—Continuance malo animo—Reasonable and probable cause—Question of fact.*—The plaintiff was a member of a joint Hindu family to which a house in Jambusar belonged. The tax in respect of this house fell into arrears. Summary proceedings before a Magistrate were instituted by the Municipality under the District Municipal Act. The amount was paid after the institution of the proceedings and the prosecution ended without a decision on the merits. The plaintiff brought this suit for damages for malicious prosecution against five defendants, namely, (1) the Municipality of Jambusar, (2) and (3) the members of its Managing Committee, (4) its Secretary, and (5) its *Daroga*. The first Court dismissed the suit. The lower Appellate Court passed a decree against defendants 1, 4 and 5 and awarded R55 as damages against them. On appeal to the High Court—*Held*, that the suit should have been dismissed as against these defendants also, that the object of the Municipal Secretary being "to teach a minatory lesson to other defaulters on the disadvantages of non-payment of the tax", that could not be regarded as an indirect motive or as malice for the purposes of such a suit, it being a legitimate end of punishment to deter other evil-doers from offending in the same way. *Quære.*—

MALICIOUS PROSECUTION—*concluded.*

Whether in such circumstances the Municipality could in any case be held liable for the malice imputed to its Secretary. *Held* further, that the Secretary was no party to the proceedings which were instituted by or on behalf of the Municipality. It was not in his power to determine whether proceedings should be instituted nor did he institute them in fact. *Held*, as to the *Daroga* that the facts failed to establish a sufficient ground for legal liability. Though a suit will lie for malicious continuation of proceedings, it was not shown that the *Daroga* took any active step after the payment or that he persevered *malo animo* in the prosecution or that he had the intention of procuring *per nefas* the conviction of the accused. *Fitzjohn* v. *Mackinder, 30 L. J. (C. P.) 257 at p. 264*, followed. MUNICIPALITY OF JAMBUSAR. *v.* GIRJASHANKER (1905) . **I. L. R. 30 Bom. 37**

——— *Malicious prosecution—Want of reasonable and probable cause—Malice—Evidence of malice.*—In cases of malicious prosecution, want of reasonable and probable cause for the prosecution is some evidence of malice. Malicious prosecution means that the proceedings, which are complained of, were initiated in a malicious spirit, *i.e.*, from an indirect and improper motive and not in furtherance of justice. *Abrath* v. *The North Eastern Railway Company, 11 Q. B. D. 455*, referred to. SRI NATH SHAHA *v.* RALLI (1905).

10 C. W. N. 253

MALIKANA.

See LIMITATION . **10 C. W. N. 151**

——— *Limitation Act (XV of 1877), Sch. II, Arts. 115, 120—Suit for recovery of arrears of malikana without seeking to enforce the charge upon the land.*—A suit for recovery of arrears of malikana, where the plaintiff does not seek to enforce the charge upon the land for which malikana is payable, is governed by Art. 115, Sch. II, of the Limitation Act *Ramdin* v. *Kalka Pershad, I. L. R. 7 All. 502*: *L. R. 12 I. A 12*, and *Miller* v. *Runga Nath Moulick, I. L. R. 12 Calc. 389*, distinguished. KALLAR ROY *v.* GANGA PERSHAD SINGH (1905). . . **I. L. R. 33 Calc. 998**

MAMLATDARS' COURTS ACT (BOMBAY ACT III OF 1876).

See LIMITATION ACT (XV OF 1877).

——— s 17—*Possessory suit—Decision—Duty of the Mamlatdar to order village officers to give effect to his order—Duty absolute and unqualified—Limitation Act (XV of 1877) not applicable.*—Where a Mamlatdar's decision awards possession, s. 17 of the Mamlatdars' Courts Act (Bombay Act III of 1876) imposes on him the duty to issue an order to the village officers to give effect thereto. The duty is in no sense conditional on an application being made to the Mamlatdar for the purpose; it is absolute and unqualified. Where such imperative duty is imposed upon a Court, then the Limitation Act (XV of 1877) has no application. *Kylasa Goundan* v. *Ramasami Ayyan, I. L. R. 4 Mad. 172*, *Vithal Janardan* v. *Vithojirav Putlajirav, I. L. R. 6 Bom. 586*, *Ishwardas Jagjivandas* v. *Dosibai, I. L. R. 7 Bom. 316*, and *Devidas Jagjivan* v. *Pirjada Begam, I. L. R. 8 Bom. 377*, followed. BALAJI *v.* KUSHABA (1906).

I. L. R. 30 Bom. 415

MANAGER.

See BENGAL TENANCY ACT.

10 C. W. N. 437

See COURT OF WARDS.

I. L. R. 33 Calc. 273

MARKET.

See BOMBAY MUNICIPAL ACT.

I. L. R. 30 Bom. 126

See DISTRICT MUNICIPALITIES ACT, ss. 191, 197.

MARKET VALUE.

See CALCUTTA MUNICIPAL ACT.

10 C. W. N. 289

MARRIAGE.

See HINDU LAW . **10 C. W. N. 338**
I. L. R. 28 All. 458

See MAHOMEDAN LAW.

I. L. R. 28 All. 496

MARRIAGE, CONSUMMATION OF.

See MAHOMEDAN LAW.

I. L. R. 30 Bom. 122

MARZ-UL-MAUT.

See DIVORCE.

See MADRAS SALT ACT (IV OF 1889).

See MAHOMEDAN LAW.

——— *Death of the husband before expiration of the period of iddat—Hanafi Sunnis—Divorce Talak-ul-bain by one pronouncement in the absence of the wife—Execution of talaknama in the presence of the Kazi—Communication of the divorce to the wife Mahomedan Law.*—In order to establish *Marz-ul-maut* there must be present at least three conditions:—(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is that at the given time death must be more probable than life: (2 there must be some degree of subjective apprehension of death in the mind of the sick person: (3) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations. Where an irrevocable divorce has been pronounced by a

MARZ-UL-MAUT—*concluded.*

Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat*, she has no claim to inherit to the husband. SABABAI v. RABIABAI (1905) . I. L. R. 30 Bom. 537

MASTER AND SERVANT.

See TORT . . 10 C. W. N. 723

MATE'S RECEIPT.

See CONTRACT . I. L. R. 33 Calc. 547

MATWALI.

See MAHOMEDAN LAW.

MAURASI MUKARARI LEASE.

See HINDU LAW I. L. R. 33 Calc. 315

MAXIM—STARE DECISIS.

See ACT XLV OF 1860, SS. 230, 235 AND 243 . . . I. L. R. 28 All. 9

MAYUKHA.

See HINDU LAW.

I. L. R. 39 Bom. 431

MEMORANDUM OF APPEAL.

See COURT-FEE. . I. L. R. 33 Calc. 11

MERCHANDISE MARKS ACT (IV OF 1889).

See CAUSE OF ACTION. 10 C. W. N. 107

MERCHANT SHIPPING ACT (57 AND 58 VICT., CHAP 60).

——— ss. 24, 57—*No Bill of sale necessary where vendor sells only equitable interest.*—The purchaser of an equitable interest in a ship can sue to establish his right to such interest and the income thereof without a registered bill of sale. S. 24 of the Merchant Shipping Act of 1894, which makes a bill of sale compulsory, does not apply to transfers of equitable interests, which are governed by s. 57 of the Act. *Ramanadhan Chetti* v. *Nagooda Maracayar, I. L. R. 21 Mad. 395*, dissented from. *Chateauneuf* v. *Capeyrou, L. R. 7 A. C. 127*, followed. ALAGAPPA CHETTY v. CHIDAMBARAM CHETTY (1906). . . I. L. R. 29 Mad. 526

MERGER.

See AWARD . I. L. R. 33 Calc. 88

——— *Purchase of mukarari interest by shikmi tenure-holder—Mortgage—Acquisition of subordinate tenure by mortgagor—Mortgagee's right to acquisition—Sale of mortgaged property—Purchasers—Sale in execution of decree on mortgage Purchaser's right to accessions—Transfer*

MERGER—*concluded.*

of Property Act (IV of 1882), s. 70, s. 111, cl. (d).—*A*, on behalf of himself and his four brothers, acquired the *shikmi* interest in a *chuck*, which at the time was subject to a *mukarari* lease. *A* and two of his brothers mortgaged the *chuck*, and subsequently *A* on behalf of himself and his four brothers acquired the *mukarari* interest in the *chuck*. It was doubtful whether the *mukarari* lease was a lease for agricultural purposes or not. *Held*, that whether s. 111, cl. *(d)* of the Transfer of Property Act applied or not, on the *shikmi* and the *mukarari* interests becoming vested at one time in the same persons, the *mukarari* interest merged in the superior tenure. *Kishen Dutt Ram* v. *Mumtaz Ali Khan, I. L. R. 5 Calc. 198*, referred to. *Held*, further, that, even if there was no merger, the purchase of the *mukarari* was an accession to the mortgaged property under s. 70 of the Transfer of Property Act, and the purchaser of the *chuck* at the sale in execution of the decree on the mortgage was entitled to ¼ths of the *mukarari* interest as well as to that of the *shikmi* interest. *Kishen Dutt Ram* v. *Mumtaz Ali Khan I. L. R. 5 Calc. 198. Shyama Charan Bhuttacharjee* v. *Ananda Chandra Das, 3 C. W. N. 323*, and *Ajudhia Prasad* v. *Mansingh, I. L. R. 25 All. 48*, followed. SURJA NARAIN MANDAL v. NANDA LAL SINHA (1906) . . . I. L. R. 33 Calc. 1212

MESNE PROFITS.

See APPEAL TO PRIVY COUNCIL.

I. L. R. 33 Calc. 1286

See COURT FEES ACT (VII OF 1870)).

See DEBUTTER . 10 C. W. N. 1000

See HINDU LAW . 10 C. W. N. 1

——— *Execution—Interest—Civil Procedure Code (Act XIV of 1882), ss. 211, 559 Appeal—Parties—Adding parties—Respondents—Power of Appellate Court to add respondent—Limitation Act (XV of 1877), s. 22*—Where a decree granted mesne profits and said nothing about interest, the amount of the mesne profits being left for determination in execution of the decree. *Held*, that the decree-holder was entitled to interest upon the mesne profits due to him, until such mesne profits are actually paid to him by the judgment-debtors. *Girish Chander Lahiri* v. *Sasi Sekhareswar Roy, I. L. R. 27 Calc. 951*, referred to. The Limitation Act does not contract the power of the Court under s. 550 of the Code of Civil Procedure to allow persons, who were parties to the proceedings in the Court below, but were not made respondents at the time when the appeal was presented, to be added as respondents, and it makes no difference whether an application is made by the appellant to bring in those persons as respondents, or the Court considers it necessary for the ends of justice that they should be added as respondents. *Manickya Moyee* v. *Baroda Prosad Mookerjee, I. L. R. 9 Calc. 355*, and *Oriental Bank Corporation* v. *Charriol, I. L. R. 12 Calc. 642*, referred to. GIRISH CHANDER LAHIRI v. SASI SEKHARESWAR ROY (1905).

I. L. R. 33 Calc. 329

MINERAL RIGHT.

See LANDLORD AND TENANT.
10 C. W. N. 17, 425, 738

MINERALS.

See DEBUTTER.

MINES AND MINERALS.

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 54

MINING COMPANY.

See INJUNCTION . 10 C. W. N. 173

MINING RIGHTS.

See INJUNCTION I. L. R. 33 Calc. 462
See LEASE.

MINOR.

See CIVIL PROCEDURE CODE.
10 C. W. N. 898
See GUARDIAN . . 10 C. W. N. 763
See GUARDIAN AND WARDS ACT.

——— *Suit—Minor not represented.*—Mere intention that a suit should be for the benefit of a minor would not bind the minor's interest, when the minor was not represented in the suit by a guardian, either natural or appointed, and the suit did not purport to be instituted on his behalf. Case of Hindu joint family distinguished. CHAUDHRI AHMED BAKSH *v.* SETH RAGHUBER DYAL (1905).
10 C. W. N. 115

MINORS ACT (XL OF 1858).

See GUARDIAN.
See MINOR.

MISCHIEF.

See PENAL CODE.

MISJOINDER.

See CIVIL PROCEDURE CODE.

——— *Cause of action—Civil Procedure Code (Act XIV of 1882), ss. 26, 31, 45 and 53—Persons jointly interested in a suit—Claims not antagonistic—Plaint, amendment of.*—A suit for recovery of possession of certain property by *A* (as heir of one *K*) and *B* as purchaser of a portion of the property from *A* is maintainable and is not bad for misjoinder of causes of action. The qualification implied in the words in respect of "the same cause of action" in s. 26 of the Civil Procedure Code would be satisfied, if the facts, which constituted the infringement of the right of the several plaintiffs, were the same. *Salima Bibi* v. *Sheikh Muhammad, I. L. R. 18 All. 131*, not followed. *Haramoni Dassi* v. *Hari*

MISJOINDER—*concluded.*

Charan Chowdhry, I. L. R. 22 Calc. 833, referred to. SUNDAR JHA *v.* BANSMAN JHA (1906).
I. L. R. 33 Calc. 367
s.c. 10 C. W. N. 508

MISJOINDER OF PARTIES.

See CIVIL PROCEDURE CODE.
10 C. W. N. 508
See PARTIES . I. L. R. 33 Calc. 425

——— *No misjoinder where one relief merely ancillary—Landlord and tenant—Rights and liabilities of joint lessors and lessors who are tenants-in-common—Transfer of Property Act (IV of 1882), ss. 37 and 109.*—A suit is bad for misjoinder, where there is a joinder of two causes of action, in each of which all the defendants are not interested. Where, however, there is really only one cause of action against some defendants, and the relief claimed against the other defendants is only ancillary to the relief to be given to the plaintiff in respect of such cause of action, the suit is not bad for misjoinder. *Saminada Pillai* v. *Subba Reddiar, I. L. R. 1 Mad. 333*, distinguished. *Per* SIR S. SUBRAHMANIA AYYAR, *Offg. C.J.*—A tenant-in common may have ejectment to the extent of his interest, on proper notice to quit; and the inclusion in such a suit of the other co-sharers as defendants is merely the inclusion of persons properly parties to the proceeding and not of litigants against whom a separate claim, having no connection with the ejectment, is made. *Per* SANKARAN NAIR, *J.*—The distinction between the law in England and India as to the rights and liabilities of joint lessors and lessees discussed and explained; as also the rights of lessors, who are tenants-in-common. Case law, English and Indian, on the subject, considered. Where the relation is created by contract with several joint landlords, according to the English cases, such relation subsists only so long as all of them wish it to continue, while according to the Indian cases it subsists until all of them agree to put an end to it; and such a contract cannot, in the absence of special circumstances, be put an end to by any one of them, if they continue to hold as joint tenants. This principle, however, will not apply when the suit is for ejectment and partition and all the co-owners are made parties. The principle embodied in ss. 37 and 109 of the Transfer of Property Act ought to be applied in such cases, though they are not expressly declared applicable. When the lessor recognizes the right of another in the premises demised, all the obligations of the lessee as to payment of rent and surrender of possession, must, if such obligations be severable, and the lessee will not be prejudiced by such severance, be performed by the lessee between the lessor and such other, in such proportions as may be settled by all the parties concerned, including the lessee. If the matter has to be decided by suit, the lessor, lessee and such other person will be necessary parties SIMHADRI APPA RAO *v.* PRATTIPATTI RAMAYYA (1905).
I. L. R. 29 Mad. 29

MISJOINDER OF PERSONS.

See JOINT TRIAL. I. L. R. 33 Calc. 292

MISREPRESENTATION.

See ADMINISTRATION BOND.
I. L. R. 33 Calc. 713

MISTAKE.

See ADMINISTRATION BOND.

See CIVIL PROCEDURE CODE.

MISTAKE, MUTUAL.

See ADMINISTRATION BOND.

MITAKSHARA.

See HINDU LAW.
I. L. R. 33 Calc. 371, 507

——— *Babuana grant—Attachment of Babuana property during the life-time of the judgment-debtor—Civil Procedure Code (Act XIV of 1882), s. 280 Order of release, effect of.*—The grantee of a *Babuana* grant has the right to alienate the property subject only to the contingent interest of the grantor. *Rameshar Singh* v. *Jibender Singh, I. L. R. 32 Calc. 683*, followed. *Babuana* grant of ancestral property by the owner of an impartible estate, to enure for the benefit not only of a junior member of the family, but of his direct male line, does not lose its ancestral character by the grant. It does not become self-acquired property in the hands of the direct male descendants of the grantee. *Maddun Gopal Thakoor* v. *Ram Buksh Pandey, 6 W. R. 71*, referred to. An order for release under s. 280 of the Civil Procedure Code being only provisional and liable to be set aside by a regular suit, has not the effect of putting an end to an attachment duly made. *Banomali* v. *Prosunno Narain Chowdhry, I. L. R. 23 Calc. 829*, referred to. RAM CHANDRA MARWARI v. MUDESHWAR SINGH (1906).
I. L. R. 33 Calc. 1158

MITAKSHARA FAMILY.

See HINDU LAW I. L. R. 33 Calc. 676

MOKURARI INTEREST.

See DEBUTTER.

See MERGER . I. L. R. 33 Calc. 1212

MOKURARI LEASE.

See DEBUTTER . 10 C. W. N. 736

MOKTESARS, POWERS OF, APPOINTMENT AND DISMISSAL OF.

See DEVASTHAN COMMITTEE.
I. L. R. 30 Bom. 508

MORTGAGE.

1. CONSTRUCTION OF MORTGAGE.
2. MORTGAGE DEBT.
3. POSSESSION UNDER MORTGAGE.
4. REDEMPTION.
5. SALE.

See BENGAL TENANCY ACT (VIII of 1885), ss. 159, 161, 162, 163, 164, 165, 166, 167.
I. L. R. 33 Calc. 878
10 C. W. N. 976

See CIVIL PROCEDURE CODE.
10 C. W. N. 115

See EVIDENCE ACT . I. L. R. 30 Bom. 113

See HINDU LAW.
I. L. R. 23 All. 133

See INTEREST.

See LAND REVENUE CODE.
I. L. R. 30 Bom. 466

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 985

See LIMITATION ACT (XV OF 1877), ss. 19, 22 . I. L. R. 33 Calc 613

See LIMITATION ACT (XV OF 1877), s. 20.
I. L. R. 33 Calc. 1276

See MAHOMEDAN LAW.
I. L. R. 28 All. 496

See MERGER . I. L. R. 33 Calc. 1212

See PARTIES . I. L. R. 33 Calc. 410

See POSSESSION I. L. R. 33 Calc 1015

See PROBATE AND ADMINISTRATION ACT.
10 C. W. N. 38

See RECEIVER . I. L. R. 33 Calc. 1175

See RES JUDICATA I. L. R. 33 Calc. 849

See SALE . . I. L. R. 33 Calc. 283

See TRANSFER OF PROPERTY ACT.
10 C. W. N. 626, 862, 910
I. L. R. 33 Calc. 867, 890

See VALUATION OF SUITS.
I. L. R. 33 Calc. 1133

1. CONSTRUCTION OF MORTGAGE.

——— *Mortgage—Payment by third person of money due under mortgage-bond—Intention to keep mortgage alive—Priority—Mortgage-bond document whether—Court-fee—Appeal.*—Where the money due under a mortgage-bond was paid by the money of a third person, the mere fact that the latter had paid off the mortgage money would not by itself entitle him to the benefit of the bond as security for the payment. It must be shown that there was an agreement between the parties when the payment was made that the mortgage should be kept alive for him. The demand of a creditor, which is paid with the money of a third person and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely

MORTGAGE—*continued.*

1. CONSTRUCTION OF MORTGAGE—*continued.*

extinguished by the payment: whether a mortgage paid off has been kept alive or extinguished depends on the intention of the parties: the mere fact that it has been paid off is not sufficient to show whether or not it has been extinguished: express declaration of intention will cause either the one result or the other and in the absence of such expression, the intention may be inferred either one way or the other: and the ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interests An unsecured creditor of a mortgagor, who finds himself obliged for the protection of his own interest to pay off the mortgage debt is entitled to have an assignment of the security. *Held*, upon the facts and circumstances of the case, that they raised a strong presumption that in the present case there was the intention to keep the mortgage alive when the payment was made by the plaintiffs. That the assignment of the bond in favour of the plaintiffs, who had paid off the mortgage gave to them all the rights as first mortgagees, although the assignment was made after the date of payment. *A* agreed to repay loans up to a certain sum, which might be paid to him by *B* and admitted that, if he failed to do so, *B* would be entitled to recover the debt by sale of a certain property of *A* and from his person and other properties. Further the deed was registered as an agreement in Book I and not as a mortgage, which would have been copied in Book IV under the Registration Rules: *Held*, that the deed did not create any special lien on the specific property mentioned in the deed and the circumstance that the document was registered as an agreement in Book I was evidence of the intention of the parties to the document to treat it as an agreement rather than a mortgage. In execution of a mortgage decree, a property was purchased for ₹2,500 by the mortgagee. *Held*, that for the purpose of Court-fee, ₹2,500 must be taken as the value of the property affected by the decree. JAGATDHAR NARAIN PRASAD *v.* BROWN (1906).

10 C. W. N. 1010
s.c. I. L. R. 33 Calc. 1133

——— *Construction of mortgage—Clause as to mortgagee accepting profits in lieu of interest qualified by subsequent clause not inconsistent with former one—Liability for compound interest—Sums payable on redemption of mortgage.*—A deed of mortgage after providing for payment of interest at a certain rate and stating that "if as a mark of favour the mortgagors let the interest remain unrealised" the principal should be payable with compound interest, stipulated by cl. 6 that "if the mortgagee took possession" she will be entitled to receive the net profit . . in lieu of interest, and during her possession the interest and profits shall be deemed equal". Cl. 11 was to the effect that "if during the period of possession of the mortgagee the profits do not cover the amount of interest, we the mortgagors will make good the deficiency. . . . if we cannot make good the deficiency we will pay it with interest at the rate mentioned above at the time of redemption." The mortgagee took

MORTGAGE—*continued.*

1. CONSTRUCTION OF MORTGAGE—*continued.*

possession under the mortgage. *Held*, in a suit for redemption that on the construction of the deed, although the *primâ facie* meaning of cl. 6, namely, that the mortgagee accepted the profits in lieu of interest was no doubt qualified by cl. 11, the latter clause was not to be rejected as being inconsistent with the former one. *Held*, also, that the mortgagors were liable to pay compound interest on the deficiency which they undertook to pay by cl. 11. JAWAHIR SINGH *v.* SOMESHWAR DAT (1905) **I. L. R. 28 All. 225**
s.c. L. R. 33 I. A. 42
s.c. 10 C. W. N. 266

——— *Construction of document—Covenant for payment by instalments—Effect of waiver of right to exact penalty for breach of covenant.*—Where a mortgagee had not, on the mortgagor's failure to make regular payments, proceeded to cancel the arrangement for payment by instalments, but had accepted irregular payments, and then the mortgagor made further default, *Held*, the mortgagee could not on such further default sue to set aside the whole arrangement *ab initio*, but was only entitled to the balance of the principal together with interest from the date of the last instalment held to be satisfied. *Radha Prasad Singh* v. *Bhagwan Rai, I. L. R. 5 All. 289*, followed. SAKHAWAT HUSAIN *v.* GAJADHAR PRASAD (1906) . **I. L. R. 28 All. 622**

——— *Transfer of Property Act (IV of 1882), s. 59—Deposit of title deeds—Equitable mortgage—Subsequent legal mortgage—Priority—Registration Act (III of 1877), ss. 17 and 48—Whether equitable sub-mortgage requires registration.*—*R* executed mortgages in favour of *D* some time before June 1893. On the 3rd June 1893, *D* deposited these mortgage-deeds with *G*'s agent in Calcutta as security for his debt to *G*. On the 19th June 1893 *D* wrote a letter to *G*'s agent which, after reciting the amount of the debt contained amongst others the following clause:—"That I shall pay him one-fourth of ₹70,000 within a fortnight, one-fourth by promissory note payable six months from date, and the remaining half by a promissory note payable within a year. In the meantime and until payment of the claim in full of Raja Gokul Dass (*G*) you will hold as agent for him the mortgage *kistbandi*, dated 25th Falgoon 1292, executed in my favour by Babu Bhagabatty Charan Roy and others as enumerated below, which I have already made over to you as such agent as aforesaid as security for the due payment of the said debt, not to be parted with by you without mutual consent of myself and Raja Gokul Dass, or under an order of Court." *Held*, that the mortgage was concluded on the day when the deeds were deposited with *G*'s agent in Calcutta, and that under s. 59 of the Transfer of Property Act a valid equitable sub-mortgage was created in favour of *G* on that day. *Kedar Nath Dutt* v. *Sham Lal Khettry, 20 W. R. 150*, referred to. Upon a suit by the equitable sub-mortgagee (*G*) to enforce his mortgage against the original mortgagor *R* and subsequent mortgagee, the defence was that the

MORTGAGE—*continued.*

1. CONSTRUCTION OF MORTGAGE—*continued.*

alleged equitable mortgage, which was created by a letter, not being registered under s. 17 of the Registration Act, had no validity at all; and that it could not have priority over the subsequent legal mortgage. *Held* that a deposit of title-deeds of certain property under a verbal arrangement to secure payment of a debt was not an oral agreement or declaration relating to such property within the meaning of s. 48 of the Registration Act, but the transaction was a valid equitable mortgage within the meaning of s. 59 of the Transfer of Property Act, and it did not require registration. *Coggan* v. *Pogose, I. L. R. 11 Calc 158*, followed. *Held*, further, that in India there is no such distinction between legal and equitable estates as is known in England, and if the claim of the subsequent legal mortgagee can be sustained it can only be sustained under s. 48 of the Registration Act. *Webb* v. *Macpherson, I. L. R. 31 Calc. 57*, referred to. GOKUL DASS *v.* EASTERN MORTGAGE AND AGENCY COMPANY (1905) . . **I. L. R. 33 Calc. 410 s.c. 10 C. W. N. 276**

——— *Simple mortgage, personal liability under, exists, unless special contract to the contrary—Absence of specific prayer in plaint no ground for refusing appropriate relief—Delay no abandonment of right Contract Act (IX of 1872), s. 74, expl., effect of.*—In the case of simple mortgages, the personal liability of the mortgagor exists, unless there is a specific contract to the contrary. *Wahid-un-Nissa* v. *Gobardhan Das, I. L. R. 22 All. 453 at p. 461*, referred to. Where the plaint asks for a decree against the defendants as members of the family and 'for such other relief as the Court may think fit,' the Court ought to grant the plaintiff such appropriate relief as he is entitled to and such relief cannot be refused on the ground that there is no specific prayer for such relief. Though it is within the scope of the authority of the managing member of a Hindu family to execute a mortgage so as to bind the family assets, the plaintiff in a suit on such mortgage is not entitled to a personal decree against a defendant member of the family, who is not a party to the mortgage in respect of the money alleged to be in his hands. Mere delay by the plaintiff in suing to enforce a contract is no evidence of an intention not to enforce its terms. Under the explanation to s. 74 of the Indian Contract Act, it is for the Court to decide on the facts of the particular case whether a stipulation for increased interest from the date of default is or is not a stipulation by way of penalty. It was not the intention of the Legislature to enact that such stipulations are always to be considered penal. The explanation was simply intended to meet the decisions in which it was held that such stipulations are not penal and must be enforced. ABBAKKE HEGGADTHI *v.* KINHIAMMA SHETTY (1906) . . . **I. L. R. 29 Mad. 491**

——— *Construction of document—Usufructuary mortgage with personal covenant for payment of the mortgage money—Such personal covenant not conferring a right of sale.*—Where a

MORTGAGE—*continued.*

1. CONSTRUCTION OF MORTGAGE—*concluded.*

mortgage is in other respects a usufructuary mortgage, the insertion therein of a personal covenant to pay the mortgage-debt on demand unaccompanied by any hypothecation of the property, the subject of the mortgage, cannot alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property in the event of non-payment of the mortgage-debt. *Jafar Husen* v. *Ranjit Singh, I. L. R. 21 All. 4*, distinguished. *Ramayya* v. *Guruva, I. L. R. 14 Mad. 232*, and *Sivakami Ammal* v. *Gopala Savundram Ayyan, I. L. R. 17 Mad. 131*, dissented from. KASHI RAM *v.* SARDAR SINGH (1905) . . **I. L. R. 28 All. 167**

2. MORTGAGE DEBT.

——— *Mortgage, suit on—Limitation—Acknowledgment—Limitation Act (XV of 1877), ss. 19, 22—Adding assignee of equity of redemption after time—Release of a portion of mortgaged property from debt—Validity—Release in writing—Registration—Registration Act (III of 1877), s. 17—Attestation, if evidence of assent—Form of relief.*—In a conveyance executed by a mortgagor in respect of a portion of the mortgaged properties in favour of a stranger there was a recital admitting the mortgagor's liability on account of the mortgage debt: *Held*, that not being addressed to any person and not having been communicated to the creditors or any person on their behalf, it was not an acknowledgment within the meaning of s. 19 of the Limitation Act. What is a sufficient acknowledgment within the meaning of that section considered. *Mylapore* v. *Yeo Kay, L. R. 14 I. A. 168 : s c. I. L. R. 14 Calc. 801*, followed. *Shuka Moni* v. *Ishan Chandra, L. R. 25 I. A. 95 : s.c. I. L. R. 25 Calc. 844, Madhusudan* v. *Brojo Nath, 6. B. L. R. 299*, referred to. After commencing a suit on his mortgage, the mortgagee applied for adding as defendant an assignee of a portion of the mortgaged properties and the latter was ordered by the Court to be so added on a date when the period of limitation for bringing the suit had expired *Held*, that the suit so far as this defendant was concerned was barred, but the plaintiff was entitled to succeed in respect of a proportionate part of his claim as against the remaining owners of the equity of redemption, who had been made parties within time. *Girish Chunder* v. *Dwarka Nath, I. L. R. 24 Calc. 640*, and *Fakira Pasban* v. *Bibee Azimunnessa, I. L. R. 27 Calc. 540*, distinguished and doubted. *Oriental Bank* v. *Charriol, I. L. R. 12 Calc. 642*, referred to. *Guruvayya* v. *Dattatraya, I. L R. 28 Bom. 11 20*, approved. *Ram Sebuk* v. *Ram Lall, I. L. R. 6 Calc. 815*, and *Ram Doyal* v. *Janmejoy, I. L. R. 14 Calc. 791*, distinguished. A release executed in writing by a mortgagee in favour of an assignee of a portion of the properties mortgaged, is inoperative, unless registered, where the interest sought to be extinguished by it is of the value of ₹100 or upwards. *Safdar Ali* v. *Luchman Das, I. L. R. 2 All. 554, Basawa* v. *Kalkapa, I. L. R. 2 Bom. 489, Bhyrub* v. *Kali, W. R. 56; Nandalal* v.

MORTGAGE—*continued.*

2. MORTGAGE DEBT—*concluded.*

Gurditta, 2 P. L. R. 615, referred to. A mortgagee who has security upon two or more properties, which he knows belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected. *Surjiram* v. *Barham Deo, 2 C. L. J. 202,* and *Surjiram* v. *Barham Deo, 1 C. L. J. 337,* followed. IMAM ALI *v.* BAIJ NATH RAM SAHU (1906) 10 C. W. N. 551
s.c. I. L. R. 33 Calc. 613

——— *Mortgage-bond—Validity Payment of part of consideration—Decree for foreclosure.*—A mortgage-bond does not cease to be enforceable merely because a part only of the money mentioned in the bond has been advanced. When it was not shown that the mortgagor had cancelled the contract or had the power to cancel it, *He d*, that the mortgagee was entitled to a decree for foreclosure upon the footing of the money actually advanced. *Minakshi Sundrum Pillai* v. *Ayyathorai, I. L. R. 18 Mad. 130*, distinguished. BAJRANGI SAHAI *v.* UDIT NARAIN SINGH (1905) . . 10 C. W. N. 932

———*Suit for recovery of mortgage debt—Form of decree in use before the passing of the Transfer of Property Act—Attachment of non-mortgaged property—Effect of such attachment.*—In a suit for recovery of a mortgage debt a decree was passed, before the coming into force of the Transfer of Property Act, 1882, in favour of the plaintiff, declaring the amount due to him and that he had a lien on the property of the mortgagee for the amount so found to be due. In execution of that decree the judgment-creditor attached certain property of the judgment debtor other than the mortgaged property This property was in due course sold, and subsequently certain mortgagees, who had taken a mortgage thereof, pending the attachment, sued to have the sale set aside. *Held* that, owing to the form in which the original decree was passed, the judgment-creditor had full power to attach and bring to sale in execution thereof any property of his judgment debtor. *Luchmi Dai Koori* v. *Asman Singh, I. L. R. 2 Calc. 213,* followed. RAM BARAN SINGH *v.* GOBIND SINGH (1905).
I. L. R. 28 All. 295

3. POSSESSION UNDER MORTGAGE.

——— *Adverse possession—Mortgagee—Possession adverse to mortgagor not adverse to mortgagee, until ownership vests in him.*—Possession of mortgaged property by a person claiming under a purchaser of the property at a sale in execution of a decree against the mortgagor for rent due in respect thereof cannot be treated as adverse to the mortgagee. The Statute of Limitation would not run against him, until the ownership in and beneficial title to the land vested in him for the first time under the decree and sale on his mortgage. *Pugh* v. *Heath, 7 App. Cas. 235,* referred to. AIMADAR MANDAL *v.* AKHAN LAL DAY (1906) . . . . I. L. R. 33 Calc. 1015
s.c. 10 C. W. N. 904

MORTGAGE—*continued.*

4. REDEMPTION.

——— *Mortgage - Decree. rate of interest in—Contract rate not compulsory after date fixed for redemption.* In suits on mortgages, it is not compulsory on the Court to allow the contract rate of interest after the date fixed for redemption by the decree. *Commercial Bank of India* v. *Ateendrulayya. I. L. R. 23 Mad. 637,* followed. SAMINATHAN CHETTIAR *v.* SWAMIAPPA NAICKER (1905) . . . I. L. R. 29 Mad. 170

——— *Clog on equity of redemption—Profits—Interest.—Held* that the following terms contained in a usufructuary mortgage did not constit te a clog on the mortgagors' right of redemption:—"The interest of the mortgage money and the profits of the lands mortgaged, have been declared to be equal. We shall obtain redemption of the mortgaged property from the possession of the mortgagee on payment of the whole of the mortgage money in a lump sum in the month of Jeth, when the land is unoccupied by crops The mortgagee is at liberty to cultivate the land mortgaged himself or have it cultivated by any other person. We shall have no objection. Should the whole or part of the land mortgaged be cultivated by us in any year, we shall pay the arrears due by us at the time of harvest and before the Government instalment has fallen due. If we raise any objection, the mortgagee shall be at liberty to recover the same from us and our mortgaged and other moveable and immoveable properties by means of distress or a suit. Should any part thereof remain unpaid, we shall pay it together with interest at one rupee per cent. per mensem and the mortgage money, in a lump sum at the time of the mortgage. We shall not be entitled to redemption without its payment." *Sheo Shankar* v. *Parma Mahton, I. L. R. 26 All. 559,* distinguished. CHATTER MAL *v.* BAIJ NATH (1905) . I. L. R. 28 All. 712

——— *Prior and subsequent mortgages—Redemption—Price to be paid by a subsequent mortgagee redeeming after the mortgaged property has been brought to sale and purchased by the prior mortgagee Rights of purchaser from prior mortgagee—Mortgagee in possession—Interest.*—*A* purchased mortgaged property from the first mortgagee, who had purchased it at a sale in execution of a decree on his own mortgage without making the second mortgagee a party to his suit and then sued to obtain *khas* possession as against the second mortgagee, who had purchased the property under his mortgage, without having made the first mortgagee a party to his own suit. *Held*, that the second mortgagee was entitled to redeem, but only upon the footing of the existence of the mortgage, as between *A* and the second mortgagee the former stood in the possession of the first mortgagee and that as between themselves, and without deciding any question as to the relative rights of *A* and the first mortgagee, the second mortgagee could only redeem on payment of what was due upon the first mortgage and not merely of the sum for which *A* had purchased. *Held*, further that, if *A* had been in actual

MORTGAGE—*continued.*

4. REDEMPTION—*continued.*

possession for any period he must either as against the interest bring into account any profits he had received or be disallowed interest during that period. *Collins* v. *Riggs, 14 Wall. 491. Nilkant Banerji* v. *Suresh Chandra Mullick, I. L. R. 12 Calc. 414,* and *Sivati Odayan* v. *Ramasubbayyar, I. L. R. 21 Mad. 64,* referred to. GIRISH CHUNDER NANDI v. KEDAR NATH KUNDU (1906).

I. L. R. 33 Calc. 590
s.c. 10 C. W. N. 592

——— *Redemption—Mortgage of which a decree for redemption was obtained before the mutiny—Possession of property remained with mortgagee, with whom it was settled and settlement confirmed by sanad—Effect of mutiny in Oudh—Payment of mortgage money—Delivery of possession delayed by notice of appeal by mortgagee—Act XIII of 1866 (Limitation of suits)—Oudh Estates Act (I of 1869) s. 6—Exclusion of mortgages from sanads—Subsequent suit for redemption—Civil Procedure Code, ss. 13 and 244.*—A usufructuary mortgage was executed in 1851 by the predecessor in title of the appellant in favour of the predecessor in title of the respondents, and in a suit for redemption of the mortgage the former had, shortly after the annexation of Oudh, obtained a decree allowing redemption on payment of the principal money only without interest. Accordingly he paid the money into the Government treasury in April 1857, but did not get possession of the property, as the mortgagee had given notice of appeal on the question of interest, and in the mutiny which then took place the treasury was looted, so that the mortgagee never received the mortgage money. On the restoration of order the Government declined either to refund to the mortgagor the amount of his deposit in the treasury, or to hold themselves responsible for the payment of it to the mortgagee. At the second summary settlement the mortgaged property was settled with the mortgagee and his taluqdari rights were confirmed by *sanad,* and that was made the ground for the rejection of petitions by the mortgagor for possession of the property and for the dismissal of another suit brought by him for redemption in 1862. That obstacle was only removed by the passing of Acts XIII of 1866 and I of 1869, s. 6 of which latter Act provided, as to lands which were in the possession of mortgagees at the time of the mutiny, that a *sanad* should not bar a suit for their redemption. The mortgagor having died, leaving two sons, the elder son in 1869 brought a suit to redeem the property, which was dismissed on the ground that by the payment of the mortgage money in April 1857 the mortgage lien had come to an end, and there was nothing left to redeem. To that suit his younger brother, the appellant, then a minor, was not a party. The appellant attained majority in 1879, and after coming to a partition with his brother, brought a suit in 1895 for redemption of the mortgaged property on payment of the principal money and such interest as the Court might award. The Subordinate Judge gave him a decree

MORTGAGE—*continued.*

4. REDEMPTION—*concluded.*

for his share of the property, but this was set aside by the appeal Courts and the suit was dismissed. *Held,* by the Judicial Committee that, on account of the appeal by the mortgagee in 1857, an order could not properly have been made by the Court putting the mortgagor into possession of the mortgaged property, and he therefore was not entitled as of right to possession when the mutiny broke out; that under the exceptional circumstances occasioned by the mutiny and rebellion in Oudh, the decree obtained by the mortgagor in 1857 for redemption could not have been executed; that the suit brought in 1869 ought to have succeeded; that a new decree which could only be regularly made in a fresh suit was required to give effect to the rights of the parties and do justice between them; and that the present suit had been wrongly held to be barred by s. 244 of the Civil Procedure Code (Act XIV of 1882). *Held,* also, that the suit was not barred by s. 13 of the Code by the dismissal of the suit brought in 1869, the appellant having been a minor at the time, and not having been properly represented in it. An intention that the suit should be for the benefit of the minor, which was the most the evidence amounted to, was not sufficient to support the plea of *res judicata,* and the fact that the suit was brought for the entire property mortgaged proved nothing. To maintain the plea of *res judicata* it must appear from inspection of the record that the person whose interest it is sought to bind, was in some way a party to the suit. CHAUDHURI AHMAD BAKSH v. SETH RAGHUBAR DAYAL (1905) . **I. L. R. 28 All. 1**

——— *Redemption—Sub-mortgage—Sub-mortgagees impleaded—No specific prayer to redeem sub-mortgage.*—The plaintiffs had purchased the equity of redemption of all the mortgaged property, part of which had been sub-mortgaged. *Held* that, having made the sub-mortgagees parties, they were entitled to redeem the whole mortgage, although they might not have specifically sought to redeem the sub-mortgage; that the proper course was to ascertain what sum was due to the sub-mortgagees and to direct payment of that amount to the sub-mortgagees out of the amount payable for redemption of the whole mortgage. *Narayan Vithal* v. *Ganoji, I. L. R. 15 Bom. 692,* followed. GOKUL DASS v. DEBI PRASAD (1906) . . . . **I. L. R. 28 All. 638**

——— *Redemption—Terms of redemption—Covenant by mortgagors to pay interest at 2 per cent.—Construction.*—On the construction of a covenant in a deed of mortgage between Hindus that the mortgagors would on redemption pay interest "at the rate of 2 per cent.," it was held by the Judicial Committee that the expression "2 per cent." meant "2 per cent. per mensem." LEKHA SINGH v. CHAMPAT SINGH (1906).

I. L. R. 28 All. 724

5. SALE.

——— *Execution—Sale—Injunction—Limitation—Limitation Act (XV of 1877), Sch. II, Art.*

MORTGAGE—*continued.*

5. SALE—*continued.*

179, cl. (4)—Subsequent application for sale of the entire property—Whether in continuation of the previous application.—*A* obtained a mortgage decree against *G* and he applied on the 11th January 1901 for sale of the mortgaged property. *G*'s son claiming a portion of the property filed a suit and obtained an injunction for stay of sale of the share claimed. On the 16th of May 1901, excluding the share of *G*'s son, the property was put up for sale. There being no bid the execution case was dismissed. On the withdrawal of the suit by the judgment-debtor's son, the decree-holder renewed his application for sale of the entire property on the 4th of July 1904 The judgment-debtor objected that, as regards the three-fourths of the share of the property, which was previously put up for sale, the application was barred by limitation. *Held*, that the application of the 4th July 1904 must be treated as a continuation of the former one of 11th January 1901, therefore the execution was not barred by limitation. *Raghunandan Pershad* v. *Bhugoo Lal, I. L. R. 17 Calc. 268*, distinguished. GURUDEO NARAYAN SINHA *v.* AMBIT NARAYAN SINHA (1905) . . . **I. L. R. 33 Calc. 68**

——— *Sale of mortgaged property under a decree for rent—Mortgagee's charge on surplus sale-proceeds—Transfer of Property Act (IV of 1882), s. 73—Bengal Tenancy Act (VIII of 1885), ss. 159, 161, 162, 163, 164, 165, 166, 167.*—When mortgaged property is sold under a decree in a rent suit, the mortgagee would have, under the provisions of s. 73 of the Transfer of Property Act, a charge on the surplus sale-proceeds whether under the decree in the rent suit the property was put up for sale with power to the purchaser to avoid encumbrances or not. Ss. 159 and 161 to 167 of the Bengal Tenancy Act cannot prejudice the right of a mortgagee in that respect. GOBINDA SAHAI *v.* SIBBUTRAM (1905) . **I. L. R. 33 Calc. 878**

——— *Mortgage—Prior and subsequent mortgagee—Sale by first mortgagee and purchase by himself—Purchaser from first mortgagee—Redemption of purchaser by subsequent mortgagee—Amount payable.*—A first mortgagee, who had no notice of a subsequent mortgage, obtained a decree for a mortgage debt (amounting to about ₹350) in a suit in which the subsequent mortgagee was not made a party, brought the property to sale and purchased it himself for ₹25 and subsequently sold it to the plaintiff for ₹99. The subsequent mortgagee, also, obtained a decree on his mortgage and purchased the property at a sale held under that decree. In a suit brought by the plaintiff against the subsequent mortgagee, in which the prior mortgagee was not made a party,—*Held*, that without prejudice to the rights of the first mortgagee and as between the plaintiff and the defendant, the latter could be allowed to redeem the former only upon payment of what was now due on the first mortgage and not merely what the first mortgagee or the plaintiff himself had paid for the property. *Collins* v. *Riggs, 14 Wallis (Irish) 491, Nilkant Banerjee* v. *Suresh Chandra Mullick, I. L. R. 12 Calc. 414*, and *Sivathi Odayan* v. *Rama Subbayar, I. L. R. 21 Mad. 64*, relied on. GIRISH CHANDRA NANDI *v.* KEDAR NATH KUNDU (1906). **10 C. W. N. 592 s.c. I. L. R. 33 Calc. 590**

MORTGAGE—*continued.*

5. SALE—*continued.*

——— *Mortgage by conditional sale—Bengal Regulation XVII of 1806—Mortgagee taking possession, according to stipulation, on mortgagor's death, but without foreclosure—Whether a trespasser—Suit for ejectment by heirs of mortgagor—Mortgagee's claim to be redeemed—Mahomedan marriage—Ghair kuf wife, right of, to inherit—Custom—Proof—Wajib-ul-arz.*—A mortgage-deed, dated 11th May 1871, provided that the mortgagor should pay up at a prescribed time, but that if he died within the fixed period, then the transaction should be considered as a "complete sale" of the hypothecated properties to the mortgagee. The mortgagor dying before the prescribed time, the mortgagee, without instituting any foreclosure proceedings, entered into possession: *Held*, that this was a mortgage by way of conditional sale within the provisions of the Bengal Regulation XVII of 1806, and that under that Regulation the mortgagee had no right to enter into possession without instituting foreclosure proceedings. The heirs of the mortgagor were therefore entitled to sue him in ejectment as a mere trespasser. HUB ALI *v.* WAZIRUN-NISSA (1906) . . . . **10 C. W. N. 778 s.c. L. R. 33 I. A. 107 I. L. R. 28 All. 496**

——— *Decree—Sale—Simple money decree—Purchase by decree-holders—Possession—Rights of parties.*—The plaintiffs, respondents, obtained a decree for sale and an order absolute under a mortgage executed by one *R. H. H. C.*, a son of *R. H.*, on the sole ground that he had not been impleaded by the mortgagees, obtained a decree, dated the 6th July 1898, declaring that his share in the family property was not liable to sale. Notwithstanding the latter decree, the plaintiffs sold the entire mortgaged property and, themselves purchasing, obtained possession. Next *J. K.*, the holder of a simple money decree against *R. H* and *H. C.*, brought to sale a six-pie share together with the equity of redemption of certain land in one of the mortgaged villages and purchased himself. *J. K.* then sued the plaintiffs for possession, obtained a decree on the 17th December 1903, subject to any rights which the plaintiffs in the present case might have over the property, and in execution of his decree was given possession of, the six-pie share. *Held*, that, although the plaintiffs' purchase in respect of the property covered by *J. K.*'s decree must be treated as a nullity, their general rights as mortgagees were safe-guarded by the terms of that decree, and s. 13 of the Code of Civil Procedure could not bar the plaintiffs' right to bring the present suit. *Held, also*, that the fact that the plaintiffs had purchased a portion of the mortgaged property did not limit them to a right to sue for a proportionate part only of the mortgage debt.

MORTGAGE—*continued.*

5. SALE—*continued.*

Bisheshur Dial v. *Ram Sarup, I. L. R. 22 All. 284*, distinguished. JUGAL KISHORE *v.* HARBANS CHAUDHRI (1906) . **I. L. R. 28 All. 700**

——— *Whether sale followed by agreement to reconvey amounts to - Contract creating personal right not transferable.*—Three brothers sold certain properties by a duly executed sale-deed. The vendee, more than two months after the sale, executed an agreement in favour of one of them in the following terms:—"You shall, on 29th January 1901, without obtaining from others and by your own earnings, pay me the sum of R350 and obtain the right of purchase from me in respect of the land sold. If you do not pay the amount on that date you shall have no right whatever." The plaintiff having obtained the assignment of the right under the agreement, sued to recover possession on payment of the amount, alleging that the sale-deed and agreement taken together amounted to a mortgage:—*Held*, that the sale deed and agreement not being between the same parties and being independent transactions could not be construed as constituting a mortgage. *Satul Pershad* v. *Luchmi Pershad Singh, L. R. 10 I. A. 129*, followed. *Held*, also, that the right conferred by the agreement was personal and not transferable. UTHANDI MUDALI *v.* RAGAVACHARI (1905) . **I. L. R. 29 Mad. 307**

——— *Mortgagee paying prior incumbrancer after sale, right of—Transfer of Property Act (IV of 1882), s. 89—Effect of order absolute for sale.*—It is settled law that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immoveable property, as for instance, the owner of the equity of redemption or a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it; and this rule will apply in favour of a person who, after the sale of the properties in the execution of a decree on the anterior mortgage, advances money on the security of such properties to enable the judgment-debtor to set aside such a sale under s. 310A of the Code of Civil Procedure. *Gokaldas Gopaldas* v. *Purammal Premsukhdas, I. L. R. 10 Calc. 1035*, referred to and followed. The provisions of s. 89 of the Transfer of Property Act have reference to the execution of a mortgage decree and ought not, in reason, to be so construed as to render the application of this principle impossible in cases where an order absolute for sale had been made on the ground that such order extinguished the security. *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi, L. R. 29 I. A*, referred to and followed in principle. VANMIKALINGA MUDALI *v.* CHIDAMBARA CHETTY (1905). **I. L. R. 29 Mad 37**

——— *Sale in execution of a simple money decree of mortgaged property—Notification of mortgage - Purchaser not estopped from disputing the existence of the mortgage—Civil Procedure Code, ss. 288 and 287.*—In execution of a simple money decree the rights of a mortgagor in certain property ostensibly subject to a mortgage were put up to sale. The property was not sold subject to the mortgage, as contemplated by s. 282 of the Code of Civil Procedure, but the existence of the mortgage was notified in the proclamation of sale for the benefit of intending purchasers. *Held*, on a suit brought by the mortgagee for sale, that the auction purchaser was not under the circumstances debarred from proving that the mortgage in suit was fictitious and without consideration. *Inayat Singh* v. *Izzat-un-nissa, I. L. R 27 All. 97*, referred to. SHIB KUNWAR SINGH *v.* SHEO PRASAD SINGH (1906) . . . . **I. L. R. 28 All. 418**

MORTGAGE—*concluded.*

5. SALE—*concluded.*

——— *Two mortgages on the same property executed by the same person—Suit under the second mortgage for sale of the property subject to the first mortgage—Civil Procedure Code (Act XIV of 1882), s. 43.*—Where a mortgagee holds two mortgages on the same property executed by the same person he cannot maintain a suit to recover the sum due on the later mortgage only, by sale of the property subject to the prior mortgage. KESHAVRAM *v.* RANCHHOD (1905). **I. L. R. 30 Bom. 156.**

——— *Limitation Act (XV of 1877), Sch. II, Arts. 62, 120, 132—Suit—Charge—Charge on surplus proceeds of prior mortgagee's sale—Money had and received—Sale—Rights of subsequent mortgagee—Right to surplus sale-proceeds.*—Certain property was sold under a decree on the first mortgage, the second mortgagee, whose mortgage had then matured, being a party to the decree. Subsequently the first mortgagee, who had a third mortgage on it, obtained a decree thereon, the second mortgagee being no party, and withdrew the surplus sale-proceeds in part satisfaction of the latter decree. The second mortgagee afterwards sued on his mortgage, claiming *inter alia* to recover the surplus proceeds so withdrawn with interest. *Held per* SALE and HENDERSON, *JJ.* (GEIDT, *J.*, dissenting). The plaintiff could only establish his right to the money not as owner, but as part of his mortgage security by proving an existing right under his mortgage and the suit so far as it related to the claim to recover the surplus sale-proceeds with interest, being one to establish the plaintiff's right as mortgagee, was a suit to enforce payment of money charged upon immoveable property within the meaning of Art. 132 of Sch. II of the Limitation Act and not one for money had and received, the second mortgage not having been proved in the first suit and no order having been made therein declaring the second mortgagee entitled to the sum in dispute. When property is sold under a decree on the first mortgage, the right of a puisne incumbrancer, who was party to the decree, to follow the surplus sale-proceeds is an equitable right, equity regarding his right not as extinguished or discharged by the sale, but as transferred thereby to the surplus sale-proceeds, which would be treated as part of

MORTGAGE—*concluded.*

5. SALE—*concluded.*

his mortgage security and his right to follow the money or the nature of the suit to enforce such right cannot be affected by the fact that the money had been withdrawn from the Court by a party having notice of the plaintiff's right. *Jogeshar Bhagut* v. *Ghanesham Dass*, 5 *C. W. N. 356*; *Kamala Kanta Sen* v. *Abdul Barkat*, *I. L. R. 27 Calc 189*; *Padmanabh Bombshenvi* v. *Khemu Komar Naik*, *I. L. R. 19 Bom. 684*; and *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan*, *I. L. R. 5 Calc. 193*, *L. R. 6 I. A. 145*, referred to. BEHAMDEO PERSHAD v. TARA CHAND (1905 . **I. L. R. 33 Calc. 92**

MORTGAGE BOND.

See ATTESTATION.
I. L. R. 33 Calc. 861

MORTGAGE DECREE.

See HINDU LAW.

MUNICIPAL BOARD.

See AGRA AND OUDH MUNICIPALITIES ACT (I OF 1900).

MUNICIPAL ELECTION.

See DISTRICT MUNICIPAL ACT.
I. L. R. 30 Bom. 400

MUNICIPALITY.

See BOMBAY MUNICIPAL ACT.

N

NAKDI.

See SECOND APPEAL.
I. L. R. 33 Calc. 200

NATIVE STATE.

——— *Law of Native State—Law in British India—Difference—Burden of proof.*—It lies on him, who asserts it, to prove that the law of the Native State differs from the law in British India and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature. RAGHUNATH v. VARJIVANDAS (1906)
I. L. R. 30 Bom. 578

——— *Kathiawar States—Whether British territory—Relation of British India with Native States, how ascertained—Sovereign powers of the Governor of Bombay in Council—Exercise in Native States through Political Agent—Courts of Political Agent and Assistant Political Agents, if King's Courts—Function of Governor in Council on appeal, whether judicial—Appeal to Privy Council.*—The rights and powers of contract possessed and exercised over the Native States in

NATIVE STATE—*concluded.*

India by the British Indian Government, with the corresponding restrictions upon the independent action of those States are, to some extent, the necessary consequence of the suzerainty vested in the predominant power. But apart from this general source, rights of very varying kinds have been acquired in connection with the several States, from other sources such rights differ not only in origin but in kind and in degree in the cases of different States, so that in each instance in which the nature or extent of such rights becomes the subject of consideration, enquiry has to be made into the circumstances of the particular case. *Sayad Muhammad Yusufud-din* v. *The Queen-Empress*, *2 C. W. N. 1*: *s.c. L. R. 24 I. A. 137*, referred to. On a view of the relation of the Kathiawar States and their people to British India, and the character of the control exercised by the British Indian Government over those States and particularly with relation to the administration of justice, *Held* that the Kathiawar States are not included within the King's dominions. Large as has been the political control exercised over them, any assertion of territorial sovereignty has been avoided. No legislative power over them has ever been claimed. The intervention in their affairs has never been carried further than was judged necessary, in the emergency for the maintenance of peace, good order and security. The position of the Chiefs has always been respected and at least, in the case of the more important among them, many of the functions commonly regarded as attributes of sovereignty have been preserved to them. The form adopted in establishing and regulating tribunals in the province has been that which was regular and appropriate, if it was not British territory, but quite irregular and inapplicable, if it was. *Damodhar Gordhan* v. *Deoram Kanji*, *L. R. 1 A. C. 332*, explained. If a Court, administering justice on the King's behalf, makes an order, judicial in its nature, by which some one is injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject. The jurisdiction exercised by the Courts of the Assistant Political Agents and the Political Agent in Kathiawar, and by the Governor of Bombay in Council on appeal, is political and not judicial. No appeal lies to His Majesty in Council from the Courts in Kathiawar or from the decision of the Governor of Bombay in Council on appeal. HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL (1905) . **10 C. W. N. 361**
s.c. L. R. 33 I. A. 1
I. L. R. 33 Calc. 219

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881).

——— s. 9 - *Hundi Holder in due course—Effect of fraudulent endorsement to fictitious endorsee.*—Two hundis not payable to bearer were intrusted to a broker by the payees for sale. The broker represented to the payees that a certain firm, known as Har Sahai Mal Kedar Nath, was willing to

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881)—*concluded.*

purchase them, and the payees accordingly endorsed them over to Har Sahai Mal Kedar Nath. The broker then forged two further endorsements on the hundis; the first from Har Sahai Mal Kedar Nath to Kedar Nath Chandu Lal; the second from Kedar Nath Chandu Lal to Bhola Nath Moti Ram. Both the last mentioned firms were fictitious. The hundis were then sold as by the last endorsees to Mahbub Bakhsh Muhammad Husain, who realized the amounts thereof from the drawee. *Held,* on a suit by the payee against the last endorsees and the broker, that the last endorsees were not protected as holders in due course and the plaintiffs could recover. *Hunsraj Purmanand* v. *Kuttonji Walji, I. L. R. 24 Bom. 65,* and *Arnold* v. *The Cheque Bank, L. R. 1 C. P. D. 578,* followed. JAI NARAIN v. MAHBUB BUKSH (1906). . . I. L. R. 28 All. 428

——— s. 80—*Collateral agreement to pay interest—Construction.*—S. 80 of the Negotiable Instruments Act XXVI of 1881) confers a right to interest in the absence of any specified rate, but does not take away a right otherwise existing by contract. Where hundis were silent as to interest, but there was a collateral agreement (effective in this case) granting interest at a specified rate. *Held,* that the above section did not apply. GHANSHIAM LALJI v. RAM NARAIN (1906) . . I. L. R. 34 I. A. 6 s.c. I. L. R. 29 All. 33

NEGOTIABLE SECURITY.

See COSTS. . I. L. R. 30 Bom. 27

NOTARY PUBLIC.

See POWER OF ATTORNEY. I. L. R. 33 Calc. 625

NOTICE OF RESUMPTION.

——— *Cantonment property—Grant—Offer of compensation—Condition precedent—Notice to one of three executors—Joint occupants. Held,* that the notice of resumption was not a condition precedent to the right of resumption. Even assuming that notice was a condition precedent, that provision had been satisfied by giving notice to one of the three executors, who were joint occupants. The provision as to notice was nothing more than a statement of what will be done, when practicable, for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve. SECRETARY OF STATE FOR INDIA v. VAMANRAV (1905) . . I. L. R. 30 Bom. 137

NOTICE, SERVICE OF.

See CIVIL PROCEDURE CODE. I. L. R. 30 Bom. 623 10 C. W. N. 297

See DECREE . I. L. R. 33 Calc. 306

See LIMITATION ACT, SCH. II, ART. 179. 10 C. W. N. 303

See MORTGAGE. . 10 C. W. N. 276

See REVENUE SALE LAW, s. 33. 10 C. W. N. 137

NOTICE TO QUIT.

See LANDLORD AND TENANT. I. L. R. 33 Calc. 339

See TRANSFER OF PROPERTY ACT, s. 106. 10 C. W. N. 841

O

OATHS ACT (X OF 1873).

——— ss. 9, 11—*Special oath—Binding effect Conclusive evidence.*—In a proceeding under s. 144, Code of Criminal Procedure, one of the parties undertook to withdraw his claim to the matter in dispute, if the other party should take an oath to a certain effect. The latter took the oath. *Held* that the oath was not binding as conclusive evidence on the party who threw out the challenge in a subsequent civil proceeding, the parties having had in mind only the proceeding under s. 141 of the Code of Criminal Procedure at the time the oath was taken. BADIADUDDIN AHMED v. NIZAMUDDIN HAIDER (1906). 10 C. W. N. 501 s.c. I. L. R. 33 Calc. 383

OBSCENE PAMPHLET.

See PENAL CODE.

OBSTRUCTION.

See CIVIL PROCEDURE CODE I. L. R. 30 Bom. 115

OCCUPANCY HOLDING.

See AGRA TENANCY ACT (II OF 1901).

OCCUPANCY RAIYAT.

See ENHANCEMENT. I. L. R. 33 Calc. 607

See LANDLORD AND TENANT.

OCCUPANCY RIGHT.

See BENGAL TENANCY ACT, s. 21. 10 C. W. N. 351

See REVENUE SALE LAW, s. 37. 10 C. W. N. 497

See TRANSFER . 10 C. W. N. 499, 1033

OCCUPANCY TENANT.

See CIVIL PROCEDURE CODE.

See KHOTI ACT . I. L. R. 30 Bom. 290

ONUS.

See BURDEN OF PROOF.

ONUS OF PROOF.

See ASSAM FOREST REGULATION (VII OF 1891), s. 40. I. L. R. 33 Calc. 895

See BOMBAY MUNICIPAL ACT. I. L. R. 30 Bom. 126

ONUS OF PROOF—*concluded.*

See GIFT. . I. L. R. 30 Bom. 578

See PRESUMPTION OF DEATH.
I. L. R. 33 Calc. 173

ORAL EVIDENCE.

See EVIDENCE ACT
I. L. R. 30 Bom. 426

ORIGINAL SIDE OF HIGH COURT.

See JURISDICTION OF HIGH COURT.
I. L. R. 33 Calc. 180

OUDH ESTATES ACT (I OF 1869).

——— s. 6.

See MORTGAGE.

OUDH LAND REVENUE ACT (XVII OF 1876), CH. VIII.

——— ss. 161, 177.

See DISQUALIFIED PROPRIETOR.
10 C. W. N. 849

P

PAKKI ADAT.

See CONTRACT.

——— *Contract—Incidents of the custom—Employment for reward.*—The plaintiffs in Bombay bought and sold in Bombay cotton and other products on the orders of the defendant, who traded at Shahada in Khandesh. In respect of the transactions sued on the plaintiffs before due date had entered into cross contracts of purchase with the merchants to whom they had originally sold goods on the defendant's account. The transactions were entered into on *pakki adat* terms. The contract of a *pakka adatia* in the circumstances of this case is one whereby he undertakes or guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted or differences paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference. The evidence in the case establishes the following propositions in connection with *pakki adat* dealings. 1. That the *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant and that no contractual privity is established between the up-country constituent and the Bombay merchant. 2. That the up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby for practical purposes cancel the same. 3. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent. *Held*, that the defendant knew of the custom, which was not unreasonable, as it did

PAKKI ADAT—*concluded.*

not involve a conflict between the *pakka adatia's* interest and duty. BHAGWANDAS v. KANJI (1905).
I. L. R. 30 Bom. 205

PALAS OR TURN OF WORSHIP.

See HINDU LAW . 10 C. W. N. 825.

PALAYAM OF UDAIPUR.

——— ancient estate of.

See HINDU LAW . 10 C. W. N. 95

PARDANASHIN LADY.

See UNDUE INFLUENCE.
I. L. R. 33 Calc. 773

PARDON.

See CRIMINAL PROCEDURE CODE.
I. L. R. 30 Bom. 611

——— *Power of Local Government to tender conditional pardon—Withdrawal of prosecution—Accomplice's evidence—Criminal Procedure Code (Act V of 1898), ss. 30, 494.*—A Local Government in India has no power to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness against others accused with him. An accomplice, if he is not an accused under trial in the same case, is a competent witness and may be examined on oath; the prosecution must be withdrawn and the accused discharged under s. 494 of the Criminal Procedure Code, before he would become a competent witness. But if the Court purporting to act under s. 494, Criminal Procedure Code, sanctions the withdrawal of the prosecution, but omits to record an order of discharge and the accused continues to be kept in custody, his position is in no way changed from that of an accused. The utmost caution is necessary in admitting or using the evidence of an approver. It not only requires corroboration in material particulars for its use, but its evidentiary value depends considerably upon the circumstances under which its evidence is tendered. *Reg.* v. *Hanumanta*, *I. L. R. 1 Bom. 910*, *Empress of India* v. *Asghar Ali*, *I. L. R. 11 All. 260*. *Queen-Empress* v. *Mona Puna*, *I. L. R. 16 Bom. 661*, *Empress* v. *Durant*, *I. L. R. 23 Bom. 213*, *Winsor* v. *Queen*, *L. R. I. Q. B. 289*, *Queen* v. *Payne*, *1 C. C. R. 349*, *Queen* v. *Behary Lall*, *7 W. R. 44*, *Mohesh* v. *Mohesh*, *10 C. L. R. 553*, *Queen-Empress* v. *Trebeni Sahai*, *I. L. R. 90 All. 426*, *Reg.* v. *Remedios*, *3 Bom. H. C. 59*. *R.* v. *Rudd*, *Cowp. 331*, and *Paban Singh* v. *Emperor*, *10 C. W. N. 847*, referred to. BANU SINGH *v.* EMPEROR (1906).
I. L. R. 33 Calc. 1353

PARSI INTESTATE SUCCESSION ACT (XXI OF 1865).

——— *Law governing Parsis in the mofussil before the introduction of the Act—Rules of equity and good conscience—Practice of English Equity Courts.*—Before the passing of the Parsi Intestate

PARSI INTESTATE SUCCESSION ACT (XXI OF 1865)—*concluded.*

Succession Act, 1865, the law governing Parsis in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience. It is true that in such cases the practice of the English Equity Courts would also be followed with necessary modifications, but the reference to these Courts would be not for the purposes of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience and of giving uniform effect to them. Before the passing of the Succession Act a Parsi husband did not acquire that particular right which in English Law accrued to a husband over his wife's personality. SHAPURJI *v.* DOSSABHOY (1905).

I. L. R. 30 Bom. 359

PARTIES.

See PENGAL TENANCY ACT, s. 88.

10 C. W. N. 216

See CIVIL PROCEDURE CODE.

I. L. R. 28 All. 41

See MESNE PROFITS.

I. L. R. 33 Calc. 32

See TRANSFER OF PROPERTY ACT (IV OF 1882) . . **I. L. R. 28 All. 174**

——— **defect of.**

See APPEAL . . **10 C. W. N. 981**

See CIVIL PROCEDURE CODE, s. 315.

10 C. W. N. 279

——— *Suit—Mortgage—Suit on mortgage bond—Person claiming under paramount title—Misjoinder of parties—Multifariousness—Civil Procedure Code (Act XIV of 1882), ss. 44, 45—Transfer of Property Act (IV of 1882), s. 85—"Property comprised in a mortgage"—Appellate Court—Other errors affecting merits of suit.*—To a suit to enforce a mortgage, persons claiming under a title adverse to that of both the mortgagor and the mortgagee are not proper parties. The term "property comprised in a mortgage" in s. 85 of the Transfer of Property Act means not the physical object, but the interest therein which the mortgagor is competent to transfer by way of mortgage at the date of the transaction. The ordinary rule is that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee. Under ss. 44, 45 of the Civil Procedure Code causes of action of this description cannot be joined in a suit to enforce a mortgage. The rule is not one of convenience merely, and the fact of the question of such title being determined by the Court of first instance in breach of the rule does not preclude a Court of appeal from reversing the decree. The question, however, is not one of jurisdiction, and where in a mortgage suit a question of paramount title raised by a defendant is tried without objection

PARTIES—*concluded.*

neither party can ask for a reversal on the ground that the issue was not properly triable in the action. JAGGESWAR DUTT *v.* BHUBAN MOHUN MITRA (1906).

I. L. R. 33 Calc. 425

PARTIES, JOINDER OF.

——— *Persons jointly interested with plaintiff may be made defendants without proof that they refused to join as plaintiff.*—Where some only out of several persons jointly interested in a cause of action bring a suit impleading the others as defendants, such suit is sustainable though it is not shown that the parties joined as defendants refused to join as plaintiffs. *Pyari Mohun Bose* v. *Kedar Nath Roy, I. L. R. 26 Calc. 409,* followed. *Biri Singh* v. *Nawal Singh, I. L. R. 24 All. 226,* followed. PERIA KARUPPAN *v.* VELAYUTHAM CHETTY (1906).

I. L. R. 29 Mad. 302

PARTIES TO SUIT.

——— *Defendant improperly impleaded as a minor—No objection raised by defendant during suit—Subsequent suit for declaration that decree was not binding on defendant—Estoppel.*—A certain defendant was impleaded in a suit as a minor under the guardianship of his mother, who was his certificated guardian. He and his mother jointly defended the suit, and at no period did the defendant raise the objection that he was not a minor when the suit was instituted. A decree was passed in favour of the plaintiff and no appeal was preferred either by the defendant or his guardian *ad litem. Held,* that it was not competent to the defendant to sue subsequently to have the decree declared not binding upon him, upon the ground that he was in fact of full age when it was instituted and that his mother had betrayed his interests. *Sheorania* v *Bharat Singh, I. L. R. 20 All. 90,* and *Hanuman Prasad* v. *Muhammad Ishaq, Weekly Notes, 1905, p. 229,* distinguished. GANGA RAM *v.* MIHIN LAL (1906) . . . . **I. L. R. 28 All. 416**

PARTITION.

See AGRA LAND REVENUE ACT (XIX OF 1873).

See HINDU LAW.

10 C. W. N. 121, 338

——— *Joint Hindu Family—Partition—Suit for partition dismissed for default—Fresh suit not barred*—Where a suit for partition was dismissed for default and a fresh suit was instituted, *held* that the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the joint property. *Nasrat-ullah* v. *Mujib-ullah, I. L. R. 13 All. 309,* followed. BISHESHAR DAS *v.* RAM PRASAD (1906).

I. L. R. 28 All. 627

——— *Partition suit—Preliminary decree—Execution struck off for default—Fresh suit, if lies.*—A previous suit for partition brought by the

PARTITION – *concluded.*

plaintiffs having been compromised, an *Amin* was appointed to effect a partition in terms of the compromise. Subsequently the parties not appearing, the executi n proceedings then pending were dismissed for default. *Held*, that a fresh suit for partition is not barred by s. 13 or s 103 of the Civil Procedure Code. *Nasratulla* v *Majibullah, I L. R 13 All. 309 at p. 313*, followed. *Soni* v. *Munshi, I. L. R. 3 Bom. 94*, distinguished. S. 103 of the Civil Procedure Code has no application to execution proceedings. MADON MOHON MONDUL *v.* BAIKANTANATH MONDUL (1905) . . . **10 C. W. N. 839**

——— *Suit for partition of immoveable property—Commissioner appointed to make partition—Court not competent to modify Commissioner's report.*—Where in a suit for partition of immoveable property a Commissioner has been appointed under s. 396 of the Code of Civil Procedure to ascertain the shares of the parties, the Court when passing its final decree, must either accept or reject the report of the Commissioner *in toto*, but is not competent to modify it. *Shah Muhammad Khan* v. *Hanwant Singh, Weekly Notes, 1898, p. 45.* JANKI PRASAD *v.* GAURI SAHAI (1905). **I. L. R. 28 All. 75**

PARTITION ACT (V of 1897).

———**s. 81.**

See LANDLORD AND TENANT.
10 C. W. N. 818

PARTITION SUIT.

——— **Valuation.**

See CIVIL PROCEDURE CODE.
10 C. W. N. 564, 839

PARTNERSHIP.

See ACT IX OF 1887.
I. L. R. 23 All. 293

——— *Partnership, tests of—Participation in profits by lender Taking active interest in business Contract Act (IX of 1872), ss. 240, 241—Holding out as partner to strangers—Estoppel—Intention—Evidence Act (I of 1872), s. 115* — The right to participate in the profits of trade is in itself a strong test of partnership, but participation in profits, although strong evidence, is not conclusive evidence of a partnership and the question of partnership must be decided by the intention of parties to be ascertained from the contents of the written instruments, if any, and the conduct of the parties. It being established in this case with regard to a person's relation towards a business carried on with his money, that he was a mere lender. *Held*, that neither the fact of his participating in the profits nor that he took an active interest in the business were inconsistent with his position as a lender. *Mollwo, March* v. *The Court of Wards, 10 B L. R. 312*, and *Badeley* v *Consolidated Bank, L. R. 38 Ch D. 208*, followed. Where the question was as to whether a person, though not in fact

PARTNERSHIP—*concluded.*

a partner, did by his acts and conduct hold himself out to strangers as such, so as to become liable by estoppel. *Held*, that to establish such liability it was not essential to show that he acted fraudulently or negligently. Even want of knowledge on his part of the effect of his acts and conduct would not absolve him from liability if his acts and conduct were such as would induce a reasonable man to believe that he was a partner and to act upon such belief. *Sarat Chandra Dey* v. *Gopal Chandra Laha L. R. 19 I. A. 203, Cornish* v. *Abington, 4 H. & N. 549, Carr* v. *London and North-Western Railway Company, L. R. 10 C. P. 316, Dickenson* v. *Valpy, 10 B. and C. 128*, referred to. PORTER *v.* INCELL (1905) . . . . **10 C. W. N. 313**

——— *Conversion of stolen goods – Managing partner receiving the goods Evidence of conversion—Liability of firm – Damages, measure of.*—Where the managing partner of the defendant firm had, without the knowledge and consent of the other partner, received certain piece-goods belonging to the plaintiff knowing that they had been stolen and had, within the scope of his authority, sold some of the goods and where there were entries in the books of the firm showing that a portion of such sales was placed to the credit of the firm, *Held* the plaintiff can recover from the defendant firm as damages for conversion the value of all the goods belonging to him, which had come into the hands of the managing partner. HURRUCK CHAND *v.* GOBIND LAL KHETRY (1905). **10 C. W. N. 1053**

PARTY.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 583, 244.
I. L. R. 33 Calc. 857

PATNI TENURE.

See SALE FOR ARREARS OF RENT.

PATNI TALUK.

See SALE FOR ARREARS OF RENT.

PAUPER.

See CIVIL PROCEDURE CODE.
I. L. R. 30 Bom. 593

——— *Application for leave to sue in forma pauperis—Death of the applicant—Revival of the application – Personal right—Civil Procedure Code (Act XIV of 1882), ss. 365, 403, 410, 413—Limitation Act (XV of 1877), s. 4.*—Where there is only an application for leave to sue in *forma pauperis*, but no suit pending in Court, and the applicant dies before the leave is granted, the right to sue as a pauper, being a personal right, cannot survive in the legal representative of the deceased applicant. The legal representative may present a fresh application for leave to sue in *forma pauperis*, or may institute a suit for the same relief, which the deceased sought to recover, if the right to sue survives in him. *Chunder Mohan Roy*

PAUPER—*concluded.*

v. *Bhubon Mohini Debea, I. L. R. 2 Calc. 389, Aubhoya Churn Dey* v. *Bissessvari, I. L. R. 24 Calc. 889,* and *Dwarkanath Narayan* v. *Madhavrav Vishvath, I. L. R. 10 Bom. 207,* referred to. LALIT MOHAN MANDAL *v.* SATISH CHANDRA DAS (1906).
I. L. R. 33 Calc. 1163

PENAL CODE (ACT XLV OF 1860).

——— **ss. 97, 99, 147.**

See RIOTING . **I. L. R. 33 Calc. 295**

——— **ss. 99 and 353**—*Assaulting public servant in the execution of his duty Vaccinator attempting to vaccinate a child forcibly—Right of private defence.*—A vaccinator attempted to vaccinate a child against the wishes of its father. The father and some of his relations intervened and assaulted the vaccinator, but did not do him any particular harm *Held,* that the child's father and other relations were perfectly justified in interfering, and under the circumstances could not be said to have acted in excess of their right of private defence. *Mangobind Muchi* v. *Empress, 3 C. W. N. 627,* followed. EMPEROR *v.* BAHAL (1906) . . **I. L. R. 28 All. 481**

——— **s. 193**—*'Judicial proceedings'—Oaths Act (X of 1873), ss. 4, 5—Criminal Procedure Code (Act V of 1898), s. 164—Magistrate empowered to administer oath when taking statements under s. 164 of the Criminal Procedure Code.*—A Magistrate taking statements under s. 164 of the Code of Criminal Procedure is acting in discharge of duties imposed on him by law and is empowered to administer an oath under ss. 4 and 5 of the Oaths Act. An investigation under Chapter XIV of the Code of Criminal Procedure is a stage of a judicial proceeding and a person making on oath a false statement in the course of such investigation commits an offence under s. 193 of the Penal Code. *Queen-Empress* v *Alagu Kone, I. L. R. 16 Mad. 421,* followed. SUPPA TEVAN *v.* EMPEROR (1905).
I. L. R. 29 Mad. 89

——— **ss. 193 and 203**—*False evidence—Accused person giving or fabricating false evidence for the purpose of concealing his own guilt.—Held,* that an accused person cannot be charged either with giving or fabricating false evidence with the sole object of diverting suspicion from himself and concealing his guilt in regard to a crime with which he is charged. EMPEROR *v.* RAM KHILAWAN (1906) . . . . **I. L. R. 28 All. 705**

——— **s. 210.**

See SANCTION TO PROSECUTE.
I. L. R. 33 Calc. 193

——— **s. 211.**

See COMPLAINT . **I. L. R. 33 Calc. 1**

——— **ss. 230, 235 and 243**—*Definition—Queen's coin—Murshidabad rupees—Practice—Duty of subordinate Courts to follow decisions of superior Courts—Maxim—Stare decisis.*—Murshidabad rupees stand on the same footing as Farrukhabad rupees and fall within illustration (*e*) to s. 230 of the Penal Code, these rupees having been stamped and issued by the authority of the Government of India or at least of the Government of the Presidency, and issued as money under the authority of the Government of India as were Farrukhabad rupees. They are therefore "Queen's coin" within the meaning of the section. *Emperor* v. *Gopal, Weekly Notes, 1903, p. 115,* followed. It is the duty of every subordinate Court, where it finds a decision of the High Court, to which it is subordinate, applicable to a case before it, to follow such decision without question. EMPEROR *v.* DENI (1906) . . . . **I. L. R. 28 All. 62**

——— **s. 273**—*Sale of noxious food—Definition—Sale of grain in bulk in a closed pit.*—Where, as a matter of trade, the owner of a grain pit sold the contents of the pit before it was opened at a certain sum per maund whether the grain was good or bad, and on the pit being opened it was found that a large proportion of the grain was unfit for human consumption, it was *held,* that the vendor could not be convicted under s. 273 of the Penal Code. EMPEROR *v.* SAIG RAM (1906).
I. L. R. 28 All. 312

——— **ss. 286 and 337**—*Definition—Causing hurt by means of a gun—Evidence of negligence.*—*Held,* that the causing of hurt by negligence in the use of a gun would fall within the purview of s. 337 rather than of s. 286 of the Penal Code. But where all the evidence against the accused was that he went out shooting in the month of July when people were likely to be about in the fields and that a single pellet from his gun struck a man, who was sitting in a field, it was *held,* that this was not sufficient evidence of rashness or negligence to support a conviction under s. 337 of the Code. EMPEROR *v.* ABDUS SATTAR (1906).
I. L. R. 28 All. 464

——— **s. 292**—*Distributing obscene pamphlet—Definition—Intention.*—The test of obscenity, with reference to a charge of distributing obscene literature, is whether the tendency of the matter is to deprave and corrupt thos whose minds are open to such immoral influences and into whose hands a publication of this kind may fall. If a publication is detrimental to public morals and calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it may come, it will be an obscene publication, which it is the intention of the law to suppress. *Empress* v. *Indraman, I. L. R. 3 All. 837, Queen-Empress* v. *Pareshram Tesvant, I. L. R. 20 Bom. 193,* and *The Queen* v. *Hicklin, L. R. 3 Q. B. 300,* referred to. The question whether a publication is or is not obscene is a question of fact. If a publication is in fact obscene, it is no defence to a charge of selling or distributing the same that the intention of the person so charged was innocent. *Reg.* v. *Gathercole, 2 Lewin. C. C. 237,* and *The King* v.

PENAL CODE (ACT XLV OF 1860)— *continued.*

Dixon, 3 M. and S. 11, referred to. EMPEROR v. HARI SINGH (1905) . **I. L. R. 28 All. 100**

——— **ss. 392, 411**—*Criminal Procedure Code, s. 181—Jurisdiction—Robbery committed outside British India—Stolen property brought into British territory.* Two persons, Baldewa, who was not a British subject, and Radhua, who was, were committed to the Court of Session at Jhansi, it being alleged against them that they had committed a robbery in an adjoining Native State and had brought the stolen property into British territory. *Held,* that though neither could be tried by the Sessions Judge of Jhansi for the robbery Baldewa because he was not a British subject, and Radhua because the certificate required by s. 188 of the Code of Criminal Procedure was wanting, yet both might be tried for the offence of retaining stolen property under s. 411 of the Penal Code. *King-Emperor* v. *Johri, I. L. R. 23 All. 266,* distinguished *Queen-Empress* v. *Abdul Latib, I. L. R. 10 Bom. 186,* followed. EMPEROR v. BALDEWA (1906). **I. L. R. 28 All. 372**

——— **s. 397**—*Dacoity with use of deadly weapons—Applicability of section.*—*Held,* that s. 397 of the Penal Code applies only to the actual person or persons who at the time of committing robbery or dacoity may use any deadly weapon, or may cause grievous hurt to any person, or may attempt to cause death or grievous hurt to any person. *Queen-Empress* v. *Senta, Weekly Notes, 1899, p. 186,* followed. *Queen-Empress* v. *Mahabir Tewari, I. L. R. 21 All. 265,* referred to. EMPEROR v. NAGESHWAR (1906). **I. L. R. 28 All. 404**

——— **ss. 415, 420.**

See CHEATING . **I. L. R. 33 Calc. 50**

——— **s. 426**—*Mischief—Definition—Fishery—Draining off water from river to the detriment of the fishing rights therein.*—*D,* as lessee of Government, held rights of fishery in a particular stretch of river *C.* by diverting the water of that river, converted the bed of the river for a considerable distance into dry land, or land with a very shallow covering of water upon it, and by so doing he was enabled to destroy and did destroy, very large quantities of fish, both mature and immature *Held,* that when *C.* deliberately changed the course and condition of the river in the manner described to the detriment of *D.*, he was guilty of the offence of mischief mentioned in s. 426 of the Penal Code. *Bhagiram Dome* v. *Abar Dome, I. L. R. 15 Calc. 388,* distinguished. EMPEROR v. CHANDA (1905) **I. L. R. 28 All. 204**

——— **s. 465**—*Forgery—Definition—Fraudulently.*—One Piari, the wife of Amir, left her husband's house. Amir put in a petition at the police station asking that a search might be made for the missing woman, and he also employed a pleader, one Ali Zohad, to assist him in discovering the whereabouts of Piari. Ali Hasan, the son of Ali Zohad, and a clerk employed in the office of the

PENAL CODE (ACT XLV OF 1860)— *concluded.*

District Superintendent of Police, forged two orders purporting to be orders of the District Superintendent of Police, the first intimating that the woman Piari was with one Sibni, the wife of Ghisu weaver, and that the Sub-Inspector should be directed to hand her over to the petitioner (Amir), and the second directing the Sub-Inspector of Kydganj to hand the woman over to the petitioner. *Held,* that in fabricating these two documents, Ali Hasan had acted fraudulently and had committed the offence punishable under s. 465 of the Penal Code. *Queen-Empress* v. *Soshi Bhushan, I. L. R. 15 All. 210, Queen-Empress* v. *Abbas Ali, I. L. R. 25 Calc. 512,* and *Kotamraju Venkatarayadu* v. *Emperor, I. L. R. 28 Mad. 90,* referred to. EMPEROR v. ALI HASHAN (1906) . . **I. L. R. 28 All. 358**

——— **ss. 466 and 471**—*Definition—Using as genuine a forged document—Copies of a forged original.*—Where a person, knowing or having reason to believe that the entries in certain village khasras were forged, took copies of those khasras and used them as evidence in his favour in a civil suit, it was *held,* that he might be properly convicted of fraudulently or dishonestly using as genuine the khasras, which he knew or had reason to be forged, and punished under s. 471 read with s. 466 of the Penal Code. EMPEROR v. MULAI SINGH (1906). **I. L. R. 28 All. 402**

——— **ss. 478, 480**—*Offence of using false trademark—No acquisition of the trademark in the sense used in the English Act necessary under s. 478 of the Penal Code—Criminal Procedure Code (Act V of 1898), ss. 227, 233, 234—Joinder of more than three offences in one trial illegal—Trial not validated by striking out charge to cure such defect after case closed, though before judgment.*—A person selling soap not manufactured by *P* in a box which bears the name of *P* as a soap manufacturer, uses a false trademark and is guilty of an offence under s. 480 of the Penal Code. It is not necessary to constitute an offence under s. 478 that a trademark in the sense in which the word is used in the English Patents, Designs and Trademarks Acts should have been acquired; and a mark is none the less a false mark because it appeared on the box and not on the goods. Under ss. 233, 234 of the Code of Criminal Procedure, a person cannot be charged with more than three offences at one trial and the defect cannot be cured after the accused had pleaded and the case had closed, by amending the charges so as to reduce it to three offences. Although the words in s. 227 of the Code of Criminal Procedure are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment, the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed, and after the mischief, which the Legislature intended to guard against, had been done. *Subrahmania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61,* referred to and explained. MANAVALA CHETTY v. EMPEROR (1906) . . . . **I. L. R. 29 Mad. 569**

PENALTY.

See CONTRACT ACT.
10 C. W. N. 640, 1010

PENDENTE LITE.

See ADMINISTRATOR GENERAL'S ACT.

PENSION.

See ACT XXI OF 1871, s. 6.
I. L. R. 28 All. 104

See PENSIONS ACT (XXIII OF 1871).

PENSIONS ACT (XXIII OF 1871).

See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879).

——— s. 4—*"Suit"—Execution proceedings—Payment of annuity charged on Saranjam lands—Liability of the son of the grantor to make the payment—Partition of family property—Income of a Saranjam village—Conciliation agreement—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 44—Decree.* A conciliation agreement was filed in Court on the 16th June 1882, under s. 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). It effected partition of family property between the brothers *A* and *N*. Under the agreement *A* undertook to pay to *N* R456-0-6 every year, and for the convenience of the parties this was to come out of the Saranjam lands, which had fallen to the share of *A*. The payment was regularly made during the life-time of *A*, and after his death *T*, the son of *A*, continued to make the payment till 1899, when he stopped making any more payments. *B*, the son of *N*, who had died, then filed a *darkhast* to enforce the payment of 1889-1900. *T* objected to this *darkhast* on two grounds: (1) that a certificate under the Pensions Act (XXIII of 1871) was necessary: and (2) that *A*'s interest having terminated with his death, the Saranjam must be considered as a fresh grant to the son, who was not liable to continue the payment. *Held*, (1) that a certificat e under the Pensions Act (XXIII of 1871) was not necessary, for the word "suit" in s. 4 of the Act does not include execution proceedings. *Vajiram* v. *Ranchordji, I. L. R. 16 Bom. 731*, followed *Held*, (2) that *A* was a trustee in respect of the R456-0-6 for Narayan, the obligation to pay which would attach to the succeeding holders of the Saranjam and it followed that *N* and his descendants would have the right to call upon *A* and his descendants to account for their management of the Saranjam and pay to them R456-0-6 per annum. A consent decree can only be set aside upon the same grounds as an agreement can be set aside *e.g.*, fraud or mistake or misrepresentation. *Per* BATTY, *J.*—"A Court executing a decree cannot question the jurisdiction of the Court, which passed it." "The present application in no way affects property falling within the purview of the Pensions Act, but seeks enforcement against the general assets of the judgment-debtor, whose liability under the decree is not made a charge on the Saranjam or cash allowance at all." That liability appears to have been imposed and accepted not as effecting any partition of the Saranjam property, but for the purpose of effecting equality in the partition of non-Saranjam property, the Saranjam property being merely indicated as a fund available to the defendant for the purpose of discharging that liability. TRIMBAKRAO *v.* BALVANTRAO (1905).
I. L. R. 30 Bom. 101

PENSIONS ACT (XXIII OF 1871)—*concluded.*

——— s. 6—*Pension—Definition—Grant of village upon payment of a quit rent—Construction of document.*—The common ancestor of the parties to a suit for partition of immoveable property had obtained one of the villages, which were the subject of the suit by grant from the Maharaja Scindhia in 1816. In 1861 this grant had been confirmed by the British Government by means of a *sanad* which contained the following material provisions. There was a declaration that the village in question shall be continued by the British Government to the grantee and his heirs inclusive of all lands, allowances and rights belonging to others, so long as he and his heirs shall continue loyal to the British Government and shall pay R800 to Government as quit rent. The *sanad* further contained a guarantee against any further payment by the holder on account of Imperial Land Revenue beyond the amount specified, and a declaration that the village and its holder shall be liable for any local taxation, which may be imposed in the district generally. *Held*, that these provisions did not amount to a grant of land revenue and the grant did not therefore fall within the purview of the Pensions Act, 1871. *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai, I. L. R. 1 Bom. 523*, referred to. GANPAT RAO *v.* ANAND RAO (1905) I. L. R. 28 All. 104

PERMANENT SETTLEMENT.

See REVENUE SALE LAW, s. 37.
10 C. W. N. 503

PERPETUAL INJUNCTION.

See CIVIL PROCEDURE CODE, s. 260.
10 C. W. N. 297

PERPETUITIES.

See JURISDICTION.
I. L. R. 33 Calc. 1065

PLAINT, AMENDMENT OF.

See MISJOINDER. I. L. R. 33 Calc. 367

PLAINT.

——— **Amendment.**

See CIVIL PROCEDURE CODE, s. 52.
10 C. W. N. 662, 841

See SECRETARY OF STATE, LIABILITY OF.
I. L. R. 33 Calc. 639

PETITION.

See COMPLAINT . I. L. R. 33 Calc. 1

PLAN.

See BUILDING . I. L. R. 33 Calc. 287

PLEADING.

See ACT IV OF 1882.
I. L. R. 28 All. 482

See PRE-EMPTION I. L. R. 28 All. 691

——— Insanity—Undue influence.

See BENAMI . . 10 C. W. N. 570

——— A plaintiff ought not, by reason of his having claimed too much, to be precluded from recovering a proportionate amount, to which he is entitled, if the pleadings are sufficient to cover such a claim. The question as to whether a partial decree ought to be made in such a case, is not one of indulgence to be granted or refused at the Court's discretion AHMAD WALI KHAN *v.* SHAMSI JAHAN BEGAM (1906) . . . . . I. L. R. 28 All. 482
s.c. L. R. 33 I. A. 81
10 C. W. N. 626

PLEDGE.

See LIMITATION . I. L. R. 30 Bom. 218

——— *Suit for money lent—Money secured by a pledge Limitation—Three years from the time of the loan.*—A suit for the recovery of money secured by a pledge is a suit for money lent. The period of limitation is three years from the time the loan is made. FELLAPPA *v.* DESAYAPPA (1905).
I. L. R. 30 Bom. 218

POLICE.

See COMPLAINT . I. L. R. 33 Calc. 1

See CRIMINAL PROCEDURE CODE.

See FALSE CHARGE.
I. L. R. 33 Calc. 30

POLICE DIARIES.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 162, 172.
I. L. R. 33 Calc. 1023

POLITICAL JURISDICTION.

See PRIVY COUNCIL.
I. L. R. 33 Calc. 219

PORT COMMISSIONERS' ACT (BENGAL ACT V OF 1870).

——— ss. 5, 6, 31, 38, 39—*Land Acquisition Act (X of 1870)—Phrase 'public purpose' explained—Highway—Statutory Road—Dedication—Public user—Animus dedicandi Power to dedicate, whether the Port Commissioners have any.* Certain lands acquired in 1874 for "a public purpose" under the Land Acquisition Act of 1870 in conjunction with the Port Commissioners' Act of 1870, were conveyed to the Port Commissioners for value in 1876. A road constructed on a portion of these lands was used by the general public from the date of its completion in 1875 till 1901. On the Port Commissioners erecting a fencing in 1903, obstructing access from adjoining premises to the road, a suit was instituted by the owners of the adjoining premises for the declaration of a private right of access to the road as a public highway and for incidental relief. *Held*, a public right of way may be created either by Act of the Legislature or by dedication, express or presumed, by the owner of the land, to the general public. The acquisition in suit did not create any public statutory road. The declaration of a 'public purpose" did not make the road a public road. The "public purpose" was under s. 38 of the Port Commissioner's Act of 1870, for the purposes of that Act By the conveyance the land became vested in the Port Commissioners. In order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an *animus dedicandi*, of which user by the public is evidence and no more. *Poole* v. *Huskinson, 11 M. and W. 827*, followed. *Quære*, whether the Port Commissioners had, having regard to the terms of their Act, power to dedicate. *The Grand Junction Canal Company* v. *Petty, 21 Q. B. D. 273*, referred to. AKSHOY KUMAR GHOSE *v.* COMMISSIONERS OF THE PORT OF CALCUTTA (1906).
I. L. R. 33 Calc. 1243

POSSESSION.

See HINDU LAW . . 10 C. W. N. 1

See LIMITATION ACT, s. 2.
10 C. W. N. 1065

See LIMITATION ACT, SCH. II, ART. 142.
10 C. W. N. 630

See MAHOMEDAN LAW.
10 C. W. N. 449, 706

See MORTGAGE . 10 C. W. N. 77

——— *Breach of the peace—Chur—Police report, contents of—Extraordinary jurisdiction of the High Court Criminal Procedure Code (Act V of 1898), s. 145—Charter Act (24 & 25 Vict., c. 104), s. 15.*—A reference by the Magistrate in the initiatory order to a police report, which clearly sets out the likelihood of a breach of the peace, is a sufficient statement of his reasons for being satisfied of the existence of a dispute likely to cause such breach of the peace. *Khosh Mahomed Sircar* v. *Nazir Mahomed, 9 C. W. N. 1005*, followed. The police report on which the Magistrate founds the initiatory order should contain a statement of facts from which he may be satisfied of the existence of a likelihood of a breach of the peace. It is essential for the assumption of jurisdiction by a Magistrate that he should be satisfied, from a police report or other information that there is a likelihood of a breach of the peace: the mere fact that there is a dispute concerning land is not sufficient by itself to give him jurisdiction. *Gobind Chunder Moitra* v. *Abdool Sayad, I. L. R. 6 Calc. 835*, and *Anesh Molla* v. *Ejahuruddin, I. L. R. 28 Calc. 446*, referred to. The Magistrate should exercise his own judgment in arriving at a conclusion as to the likelihood of a breach of the peace from the materials before him or the circumstances within his knowledge, and he ought not to act upon a mere

POSSESSION—*concluded.*

expression of opinion by the police not accompanied by a statement of facts sufficient to satisfy him and to enable him to form his own opinion. But it is not necessary that the police report should show an actual assembly of men or other specific overt acts. *Puddomonee Dassee* v. *Juggodumba Dassee, 25 W. R. Cr. 2,* and *Rajah Run Bahadur* v. *Ranee Tilessuree Koer, 22 W. R. Cr. 79,* dissented from. The High Court should not ordinarily examine whether the grounds on which the Magistrate was satisfied as to the likelihood of a breach of the peace afford a reasonable foundation for his conclusions. *Dhunput Singh* v. *Chaterput Singh, I. L. R. 20 Calc. 513,* dissented from. The "imminence" of a breach of the peace, as indicating a higher degree of the chance of the event happening than is denoted by the "likelihood" of it, is not essential for the exercise of jurisdiction by the Magistrate. *Gobind Chunder Moitra* v. *Abdool Sayed, I. L. R. 6 Calc. 835*; *Kali Kishen Tagore* v. *Anund Chunder Roy. I. L. R. 23 Calc 557,* and *Janu Manjhi* v. *Maniruddin, 8 C. W. N. 590,* dissented from. *Uma Churn Santra* v. *Beni Madhub Roy, 7 C. L. R. 352,* and *Damodur Bildyadhur Mohapatro* v. *Syamanund Dey, I. L. R. 7 Calc. 385,* approved of. Under s. 15 of the Charter Act the Court will not interfere, unless it is satisfied that the party seeking the interference has been prejudiced by the proceedings in the Court below. *Sukh Lal Sheikh* v. *Tara Chand Ta, 9 C. W. N. 1046,* followed. *Sheikh Munglo* v. *Durga Narain Nag, 25 W. R. Cr. 74, Chunder Madhub Ghose* v. *Juggat Chunder Sen, 4 C. L. R. 483, Queen-Empress* v. *Gobinda Chundra Das, I. L. R. 20 Calc. 520,* and *Kali Kissen Tagore* v. *Anund Chunder Roy, I. L. R. 23 Calc. 557,* explained. *Gour Mohun Majee* v. *Doollubh Majee, 22 W. R. Cr. 81,* referred to. Where a party chooses to wait and take the chance of a judgment in his favour he cannot be heard to complain of an excess of jurisdiction and to claim, as a matter of right, that the proceedings should be set aside. *Marsden* v. *Wardle, 3 E. and B. 695,* followed. *Farquharson* v. *Morgan, 1 Q. B. 552,* not followed. There is no inflexible rule of law that a Magistrate, in deciding the question of possession under s. 145 of the Code, is concluded by every previous order of a Civil or Criminal Court relating to the subject of dispute, and the weight to be attached to any such previous order depends on the facts and circumstances of the particular case. *Gobind Chunder Moitra* v. *Abdool Sayad, I. L. R. 6 Calc. 835, Sims* v. *Jokurry Lal, 5 C. W. N. 563,* and *Doulat Koeri* v. *Rameswari Koeri, I. L. R. 26 Calc. 652,* distinguished. *Lowsen Santal* v. *Kali Churn Santal, 8 C. W. N. 719,* and *Gulnaj Marwari* v. *Sheikh Bhatoo, I. L. R. 32 Calc. 796,* approved of. KULADA KINKAR ROY v. DANESH MIR (1905).

I. L. R. 33 Calc. 33

POWER-OF-ATTORNEY.

———: *Notary Public—Identification—Administration—Affidavit—Evidence Act (I of 1872), ss. 85 and 114—Presumption of regularity—Rules and Orders of the High Court of Calcutta—Rule 748—Direction of Court in particular case to require further evidence of identity.*—On an application for grant of letters of administration with copy of the will annexed to the constituted attorney of the sole executor of deceased; *Held* that s. 85 of the Evidence Act is mandatory. In the case of a document purporting to be a Power-of-Attorney and to have been executed before and authenticated by a Notary Public, the authentication of the Notary is to be treated as the equivalent of an affidavit of identity of the executant, and no affidavit of identity is necessary. In any particular case, if the Court is not satisfied, it may, under Rule 748 of the Rules and Orders of the High Court of Calcutta, require further evidence of the verification of the Power-of-Attorney. IN THE GOODS OF MYLNE (1905) . . **I. L. R. 33 Calc. 625**

POWER-OF-ATTORNEY—*concluded.*

POWER OF DISPOSAL.

See STRIDHAN . **I. L. R. 30 Bom. 229**

PRACTICE.

See ADMINISTRATION BOND.
10 C. W. N. 673

See ARBITRATION. **I. L. R. 33 Calc. 498**

See BURDEN OF PROOF.
10 C. W. N. 985

See CIVIL PROCEDURE CODE.
10 C. W. N. 609
I. L. R. 30 Bom. 455, 603

See EVIDENCE . **I. L. R. 33 Calc. 1345**

See HINDU LAW . **10 C. W. N. 95**

See INTEREST . **10 C. W. N. 884**

See LETTERS PATENT.
I. L. R. 30 Bom. 364

See LIMITATION ACT.
I. L. R. 30 Bom. 329

See RECEIVER . **I. L. R. 30 Bom. 250**

See SMALL CAUSE COURT ACT.
I. L. R. 30 Bom. 147

See TAXATION . **I. L. R. 33 Calc. 827**

——— *Suit by next friend—Lunatic—Plaintiff a person of unsound mind not so found—Civil Procedure Code (Act XIV of 1882), s. 463—Not exhaustive—Landlord and tenant—Abandonment—Transfer by tenant of non-transferable holding—Usufructuary mortgage.* The provisions of s. 463 of the Civil Procedure Code are not exhaustive, and a lunatic may sue through a next friend, even though not adjudged a lunatic under any law. When a tenant of a non-transferable holding executes a usufructuary mortgage of it, places the mortgagee in possession, abandons the holding and leaves the village, the landlord is entitled to treat the mortgagee as a trespasser and to ask for his ejectment. *Per* MOOKERJEE, *J.* The Code of Civil Procedure is not exhaustive. A Court in which a suit has been instituted by or against a lunatic not so

PRACTICE—*continued.*

found has an inherent power to determine whether he is a lunatic and, if he is found to be so to make an order for the appointment of a next friend or guardian *ad litem*. RASIK LALL DATTA v. BIDHUMUKI DASI (1906) . **I. L. R. 33 Calc. 1094**

——— *Payment into Court of money due under a bond bearing interest—Appropriation of such payments first to satisfaction of interest.*—It appears to be a well settled practice of the Courts to appropriate payments made upon a bond first to the interest due thereon, and thereafter, if any balance remain, to the principal. *Luchmeswar Singh Bahadur* v. *Syed Lutf Ali Khan*, 8 *B. L. R. 110*, and *Gooroo Das Dutt* v. *Ooma Churn Roy*, 22 *W. R. 525*, referred to. MAHARAJA OF BENARES v. HAR NARAIN SINGH (1905) . **I. L. R. 28 All. 25**

——— *Privy Council—Appeal—Practice—Concurrent judgments on facts—Disagreement on subordinate points.*—The Judicial Committee does not ordinarily entertain an appeal from concurrent judgments on a mere question of fact. The mere fact that the two Courts do not agree on all the steps which lead to one and the same conclusion, is no reason for disregarding the above well-known rule. That rule, however, is not an absolute rule, it presses upon the appellant with more or less weight according to the circumstances of the case, and the fact that the Courts have differed on some important, but subordinate questions is a matter to be taken into consideration in determining whether the evidence before the lower Courts should be reviewed in detail. CHITPAL SINGH v. BHAIRON BAKSH SINGH (1905) . . **10 C. W. N. 225**
s.c. I. L. R. 28 All. 219

——— *Privy Council—Appeal—Practice—Concurrent findings of fact on questions relating to Indian manners and customs—Succession—Family custom.*—When the question upon which there are concurrent findings of the Lower Courts is not only a question of fact, but is one which embraces a great number of facts, whose significance is best appreciated by those who are familiar with Indian manners and customs, the Judicial Committee is specially unwilling to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing such concurrent findings. *Umrao Begam* v. *Irshad Husain*, *L. R. 21 I. A. 163*, referred to. KUNWAR SANWAL SINGH *v.* SATRUPA KUNWAR (1905) . **10 C. W. N. 230**
s.c. L. R. 33 I. A. 53
I. L. R. 28 All. 215

——— *Affidavit of documents by order of the Prothonotary against Advocate General—Power of the Court—Prerogative of the Crown—High Court Rule 80a—Civil Procedure Code, s. 129.*—The position of the Advocate General in India corresponds by statutory enactments to the position held by the Attorney General in England and there is ample authority for the view that, generally speaking, the Attorney General is not called upon to make discovery on oath. An order by the Prothonotary calling upon the Advocate General to show cause why a suit instituted by him should not be dismissed

PRACTICE—*continued.*

for want of prosecution is not one which is within the jurisdiction of the Prothonotary to make. ADVOCATE GENERAL OF BOMBAY *v.* ADAMJI (1905).
I. L. R. 30 Bom. 474

——— *Chamber proceedings—Certifying Counsel.*—In certifying for Counsel in chamber matters the Court ought to have regard to the following circumstances: (1) Whether notice has been given by either side of the intention to employ Counsel. (2) Whether the matter to be dealt with involves the consideration of complicated facts or merely of simple facts. (3) Whether there arises any substantial question of law, which has to be argued and discussed. *Per* CURIAM: The rule as to certifying for Counsel has been interpreted as meaning that Counsel should be certified, unless it is not a fit case for Counsel. ZULEKABAI v. AYESHABAI (1905).
I. L. R. 30 Bom. 196

——— *Evidence taken in a particular way—Consent of parties—Jurisdiction of the Court.*—In a suit to recover damages for wrongful diversion by the defendants of the course of a brook, the Subordinate Judge, at the desire of both the parties, proceeded to the spot of the diversion, made inspection and examined witnesses on the spot. The depositions of the witnesses were taken down in vernacular by a clerk of the Court. On going through the evidence the Subordinate Judge dismissed the suit holding that the defendants had not diverted the course of the brook and the plaintiff had not suffered any damage. The plaintiff appealed and raised a preliminary objection to the procedure of the Subordinate Judge. The Judge in appeal held that the Subordinate Judge's procedure vitiated the decision and reversed the decree and remanded the suit for trial on the merits. On second appeal by the defendants against the order of remand—*Held*, reversing the decree of the Judge and restoring the appeal to the file, that the parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way and it is a common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence, which apart from their consent cannot be so used. RAMAYA v. DEVAPPA (1905) . **I. L. R. 30 Bom. 109**

——— *Ex parte order—False representation—Suit for relief inconsistent with order—Set-off claimed in written statement—Omission to frame issue—Civil Procedure Code (Act XIV of 1882), ss. 111, 146, 561, 566—Company—Liquidation—Companies Act (VI of 1882), ss. 149, 214—Per* JENKINS, *C. J.*: In the conditions which prevail here, the practice of passing *ex parte* orders involving the person affected in serious liability, is much to be deprecated. AHMEDABAD ADVANCE SPINNING AND WEAVING CO. *v.* LAKSHMISHANKER (1904).
I. L. R. 30 Bom. 173

——— *High Court—Original Side—Suits by manager of joint Hindu family having minor co-*

PRACTICE—*concluded.*

parceners—Minors' names should be added as parties—Will—Construction—Rule against perpetuity—Succession Act (X of 1865), s. 101.—As a matter of practice suits are not filed on the Original Side of the Bombay High Court by managers representing their minor co-parceners, the practice is to join all persons interested, but it would seem that even if on the face of the plaint there were an allegation of a sole plaintiff, that he sued as manager on behalf of a co-parcenary the minor coparcener would not be bound by the proceedings, unless by judicial sale under the decree rights had been created in innocent third parties and no prejudice were shown to the absent minors. Cl. 13 of the will produced in this case was as follows:—"As to my other property which there is, that is the property situated on the east side of the house of my step-brother, I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be any such son or sons. In case he leaves no sons behind him my Mukhtyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years." *Held*, on a construction of the above clause, that the bequest in favour of a son of Mahadev, who might be adopted at any time after Mahadev's death by a widow, who might not have been living at the testator's decease, was void under s. 101 of the Indian Succession Act (X of 1865). KASHINATH CHIMNAJI *v.* CHIMNAJI SADASHIV (1906).

I. L. R. 30 Bom. 477

PRECATORY TRUST.

See DEBUTTER.

PRE-EMPTION.

See ACT VII OF 1870, SS. 7 AND 12.

I. L. R. 28 All. 411

See LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 10 AND 120.

I. L. R. 28 All. 424

See MAHOMEDAN LAW.

I. L. R. 28 All. 24

——— *Evidence of custom—Custom need not be immemorial.*—In order that a custom of pre-emption may be held to be established it is not necessary to show that the custom is immemorial, in the sense of the English common law. Hence, where in a village, which came into existence after 1846 there was found in 1869 evidence of a custom of pre-emption amongst the co-sharers, and further evidence of such a custom in 1885, it was *held*, that the custom was sufficiently established for the Courts to give effect to it. *Kuar Sen* v. *Mamman, I. L. R. 17 All. 87, Gokul Dichhit* v. *Maheshri Dichhit, Weekly Notes, 1905, p. 266,* and *Mohidin* v. *Shivlingappa, I. L. R. 23 Bom. 666,* followed. LEKHRAJ BHARTHI *v.* ANRUDH TIWARI (1906).

I. L. R. 28 All. 434

PRE-EMPTION—*continued.*

——— *Local custom—Finding by lower Court regarding existence of alleged custom—Second appeal.*—Where on a question as to the existence or non-existence of a particular custom the lower Appellate Court has acted upon illegal evidence or on evidence, which is legally insufficient to establish an alleged custom, the question is one of law; or if it appears that the lower Appellate Court has clearly from its judgment disregarded legal evidence, the Court can interfere; but the High Court in second appeal is not bound notwithstanding that the lower Appellate Court has heard and weighed the legal evidence offered on both sides, to examine and consider the evidence in all cases when the existence or non-existence of an alleged custom is the sole question at issue. *Kakarla Abbaya* v. *Raja Venkata Papayya Rao, I. L. R. 29 Mad. 24, Chakauri Devi* v. *Sundari Devi, Weekly Notes, 1906, p. 144,* referred to. HASHIM ALI *v.* ABDUL RAHMAN (1906).

I. L. R. 28 All. 698

——— *Mahomedan Law—Shafi-i-khalit—Easement—Owner of dominant tenement.*—Under the Mahomedan law of pre-emption the owner of the dominant tenement has in respect of a sale of the servient tenement a right of pre-emption as a *shafi-i-khalit*, which is preferable to the right of one, who is merely a neighbour as regards the property sold. *Shaikh Karim Buksh* v. *Kamr-ud-din, All. H. C. 1874, p. 377,* and *Chand Khan* v. *Niamat Khan, 3 B. L. R. A. C. 296,* referred to. KARIM *v.* PRIYO LAL BOSE (1905) . **I. L. R. 28 All. 127**

——— *How far Mahomedan Law of pre-emption applicable amongst Hindus—Statement of claim—Meaning and not form of statement to be considered.—Held*, that "in the absence of allegation or proof as to any custom different from, or not co-extensive with the Mahomedan law of pre-emption, that law must be applied" between Hindus. *Jagdam Sahai* v. *Mahabir Prasad, I. L. R. 28 All. 60, Chowdhree Birj Lal* v. *Raja Goor Sahai, N.-W. P. H. C. Rep. F. B. 1866-67, Vol. I, p. 128,* and *Jai Kuar* v. *Heera Lal, All. H. C. 1875, p. 1,* referred to. Further, where the words used were "I have a claim for pre-emption on this house. If any one else purchases it, I shall be put to inconvenience. Go at this very moment and take the money from Shoshi Bhusan Sircar and tell Ram Charan and Chakauri Devi to return the house by taking the money." *Held*, that this was sufficient claim; the concluding portion evincing a desire on the part of the plaintiff to avail herself of her right. If she had merely stated that she had a claim that would not have been sufficient. CHAKAURI DEVI *v.* SUNDARI DEVI (1905) . **I. L. R. 28 All. 590**

——— *Mahomedan Law—Talab-i-mawasibat—Power of general attorney to make the talab-i-mawasibat—Pleadings—Practice.*—Where the plaintiff in a pre-emption suit alleged that the first demand or *talab-i-mawasibat* was made for him by his general attorney and the defendant did not deny that the person in question was the general attorney of the plaintiff, but in fact no *mokhtarnama* or copy

PRE-EMPTION—*continued.*

of it was filed, the original being filed in another appeal then pending before the lower Appellate Court. *Held* that, looking to the pleadings, the lower Appellate Court, if it had any doubt on the point, should either have examined the other record or at least have given the plaintiff an opportunity of filing the *mukhtarnama* or a copy. *Held*, further, that the first demand or *talab-i-mawasibat* can be made by a general attorney. *Abadi Begam* v. *Inam Begam*, *I. L. R. 1 All. 521*, and *Hari Har Dat* v. *Sheo Prasad*, *I. L. R. 7 All. 41*, followed. *Musammat Ojheeoonissa Begam* v. *Sheikh Rustam Ali*, *W. R. 1864*, *p. 219*, referred to. MUNNA KHAN *v.* CHHEDA SINGH (1906) . . **I. L. R. 28 All. 691**

——— *One total price for ten villages—Ten separate conveyances having a separate price for each village—Annual profits—Government revenue—Amount to be paid on pre-emption.*—Where *A* agreed to buy from *B* ten villages for one total price, but by subsequent agreement between *A* and *B* ten separate conveyances were executed showing ten separate prices,—*Held*, in a suit for pre-emption that if it was proved that the consideration mentioned in the sale deeds had been paid and received the Court should not look further and ascertain the value of the property in suit by a consideration of the annual profits or of the amount of Government revenue. O'CONOR *v.* GHULAM HAIDAR (1906).

I. L. R. 28 All. 617

——— *Two successive purchases by same vendee—Claim to be a co-sharer at date of suit on first purchase in virtue of the second purchase.*—Where in a suit for pre-emption, it appeared that the vendee had, prior to the date of the suit, made a second purchase in regard to which no suit had been filed prior to the date of the institution of the suit in regard to the first purchase, but limitation had not expired in regard to the second purchase,—*Held*, that the vendee could not be considered by virtue of his second purchase to have been a co-sharer at the date of the institution of the suit on the first purchase. *Bhagwan Das* v. *Mohan Lal*, *I. L. R. 25 All. 421*, distinguished. KALESHAR RAI *v.* NABIBAN BIBI (1906) . . . . **I. L. R. 28 All. 642**

——— *Decree in pre-emption suit—Payment into Court—Costs—Set-off.*—A judgment, dated the 24th September, 1904, in favour of the pre-emptors under a foreclosure decree directed payment within two months of R2,100, together with the costs, if any, incurred by the purchaser in obtaining the order absolute. The corresponding decree contained the words, "together with the costs of the purchaser in the foreclosure case, if any." The decree also awarded the plaintiffs a sum of R117-4-0 as costs. The R2,100 was paid within the time fixed. On the 24th February, 1905, the judgment-debtors claimed that they were entitled to be restored to possession and that the suit must be deemed to have been dismissed, inasmuch as the costs, amounting to R25-12-0, of the proceedings relative to the order absolute had not been deposited. *Held*, following *Ishri* v. *Gopal Saran*, *I. L. R. 6 All. 351*, that the R117-4-0 could be set off against the R25-12-0; that the R2,100 deposited was therefore in excess of the actual sum payable under the decree; and that the judgment-debtors' claim failed. *Jaggar Nath Pande* v. *Joku Tewari*, *I. L. R. 18 All. 223*, referred to. PARMANAND RAOT *v.* GOBARDHAN SAHAI (1906).

I. L. R. 28 All. 676

——— *Wajib-ul-arz—Construction of document—Mahomedan Law—"Intiqal."*—Where in a wajib-ul-arz it was recorded merely that "the custom of pre-emption prevails," it was *held* that in the absence of any special custom different from or not co-extensive with the Mahomedan law of pre-emption, the Mahomedan law must be applied. *Ram Prasad* v. *Abdul Karim*, *I. L. R. 9 All. 513*, followed. The term "*intiqal*" occurring in the pre-emptive clause of a wajib-ul-arz covers all kinds of transfers, mortgages as well as sales. JAGDAM SAHAI *v.* MAHABIR PRASAD (1905).

I. L. R. 28 All. 60

——— *Wajib-ul-arz—Owner of isolated plots in a village.*—*Held*, that the owner of isolated plots of land in a village is a co-sharer in the village and may as such possess rights of pre-emption, although he does not own a share in the zamindari of the village and his name is not recorded in the khewat. *Safdar Ali* v. *Dost Muhammad*, *I. L. R. 12 All. 426*, and *Dakhni Din* v. *Rahim-un-nissa*, *I. L. R. 16 All. 412*, followed. ALI HUSAIN KHAN *v.* TASADDUQ HUSAIN KHAN (1905) . **I. L. R. 28 All. 124**

——— *Wajib-ul-arz—Construction of document.*—The pre-emptive clause of a wajib-ul-arz was drawn up in the following terms:—"In case of great necessity each co-sharer is entitled to transfer his property as recorded in the *khewat*, and the near co-sharers and the pattidars can claim a pre-emptive right; but out of them the one, who is nearer, will have a prior right to do so." *Held*, that the right of pre-emption only arose on a sale to a stranger. If the sale was to a co-sharer, no right of suit accrued to a nearer co-sharer. JAI DAT *v.* RAM BADAL (1905) . . **I. L. R. 28 All. 168**

——— *Wajib-ul-arz—Sale of land by Government.*—When Government has acquired land permanently it does not become a co-sharer in the village, to which the land originally appertained, and on a sale thereof the provisions contained in the village wajib-ul-arz, which deal with sales by co-sharers in the village, are not applicable. GAYA SINGH *v.* RAM SINGH (1905) . **I. L. R. 28 All. 235**

——— *Wajib-ul-arz—Pre-emptor accepting a lease of property in suit from the vendee.*—Where in a suit for pre-emption based upon a custom declared in the wajib-ul-arz it was found that the pre emptor had, with knowledge of his right as pre-emptor, accepted a lease of the land claimed from the vendee, it was *held* that this amounted to such an acquiescence in the sale as would bar the plaintiff's right of suit. KISHAN LAL *v.* ISHRI (1905).

I. L. R. 28 All. 237

——— *Wajib-ul-arz—Co-sharer—Owner of plot of grove land.*—*Held*, that a person who buys a

PRE-EMPTION—*continued.*

plot of grove land in a village does not thereby become a co-sharer in the village so as to entitle him to enforce a right of pre-emption under a wajib-ul-arz, which confers such right upon co-sharers. *Dakhni Din* v. *Rahimun-nissa, I. L. R. 16 All. 412,* and *Ali Husain Khan* v. *Tasadduq Husain Khan, supra p. 124,* referred to. MUHAMMAD ALI *v.* HUKAM KUNWAR (1905) . I. L. R. 28 All. 246

——— *Wajib-ul-arz—Construction of document—Partition of village into separate mahals.*—In a village which consisted of two pattis or mahals the wajib-ul-arz recorded a custom of pre emption to the effect that in the case of a sale or mortgage by a shareholder a claim for pre emption might be brought by (*1*) own brothers and nephews, (*2*) cousins who are co-sharers, (*3*) co-sharers in the patti, and (*4*) shareholders in the village (*hissadaran deh*). The village was subsequently divided into more mahals: but no new wajib-ul-arz was framed,—*Held*, that a co-sharer in the village had a right of pre-emption as against a stranger, even though he did not own a share in the mahal, in which the property sold was situate. *Dalganjan Singh* v. *Kalka Singh, I. L. R. 22 All. 1,* referred to. JANKI *v.* RAM PARTAB SINGH, (1905). I. L. R. 28 All. 283

——— *Wajib-ul-arz—Construction of document—"Qimat."—Held,* that the word '*qimat*' as used in the pre-emptive clause of a *wajib-ul-arz* is wide enough to include the consideration given for a usufructuary mortgage with possession as well as for a sale. HULAS KAI *v.* RAM PRASAD (1906). I. L. R. 28 All. 454

——— *Wajib-ul-arz—Construction of document—Custom or contract.*—In a suit for pre-emption two *wajib-ul-arz* were relied upon. The earlier *wajib-ul-arz* of the year 1864 provided that "if a sharer desires to transfer his share, the first right of pre-emption is possessed by his near brother, next by the sharers in the patti and next by the sharers in other pattis, and when all these have declined to take a transfer the sharer may sell to any one he likes." The later *wajib-ul-arz* of the year 1884 under the head, "custom as to pre-emption" provided that "no such case has as yet occurred: but we acknowledge the right of pre-emption." *Held*, that the *wajib-ul-arz* of 1864 was evidence of the existence of a right existing by custom and the provision in the latter was a recognition by the parties of the custom prevailing under the earlier *wajib-ul-arz. Ram Din* v. *Pokhar Singh, I. L. R. 27 All. 553,* followed. DAULAT *v.* MATHURA (1906). I. L. R. 28 All. 456

——— *Wajib-ul-arz—Construction of document—Retention of same wajib-ul-arz after division of village into mahals—Hissadaran deh and hissadaran patti on the same footing.*—Where a village was divided into three mahals and the new wajib-ul-arz, which was prepared for one of them *A. M.* was copied verbatim from the wajib-ul-arz of the village before division and clearly put *hissadaran deh* and *hissadaran patti* on the same footing,—*Held*, that a co-sharer in the mahal *A. M.* had no right of pre-emption in regard to property sold in *A. M.* as against a co-sharer who, though he had no share in the mahal *A. M.*, was a co-sharer in one of the other mahals. *Dalganjan Singh* v. *Kalka Singh, I. L. R. 22 All. 1,* distinguished. SARDAR SINGH *v.* IJAZ HUSAIN KHAN (1906). I. L. R. 28 All. 614

PRE-EMPTION—*concluded.*

——— *Wajib-ul-arz—Inference from entry in previous wajib-ul-arz - Mahomedan Law.*—A village wajib-ul-arz, prepared in the year 1883, contained only the following entry with reference to pre-emption:—"Custom of pre-emption:—No pre-emption suit has been instituted, but the custom of pre-emption is accepted." But the wajib-ul-arz of the same village, prepared in 1864, was more explicit. It ran as follows:—"Mention of the right of pre-emption:—When it is desired to transfer a share, the heirs and near brethren have the right first. On their refusal to take, the transferor is competent to sell, mortgage or assign to anyone he likes."—*Held*, that in the wajib-ul-arz of 1883 the villagers intended to reproduce - and understood they were in fact reproducing—the custom of pre-emption that prevailed in 1864: that therefore the provisions of the Mahomedan law were not applicable. POKHAR SINGH *v.* HUSAIN KHAN (1906). I. L. R. 28 All. 679

——— s. 266 (k)—*Execution of decree—Attachment—Contingent right—Right of pre-emptor under a conditional decree for pre-emption.*—*Held*, that the interest in the pre-empted property of a successful pre-emptor, who has not yet paid the pre-emptive price fixed by his decree is an interest the attachment of which is prohibited by s. 266 (*k*) of the Code of Civil Procedure. GORAKH SINGH *v.* SIDH GOPAL (1906) . . . I. L. R. 28 All. 383

PREJUDICE.

See RIOTING . I. L. R. 33 Calc. 295

PREROGATIVE OF THE CROWN.

See ADVOCATE GENERAL.
I. L. R. 30 Bom. 474

See CIVIL PROCEDURE CODE.

PRESCRIPTION.

———*Right to cornice acquired by, after 12 years' enjoyment.*—Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he will by prescription acquire a right to the space occupied by such projection and the right to maintain it in its position. A cornice overhanging a neighbour's land cannot be removed by such neighbour, if it has been in existence for more than 12 years. *Mohonlal Jechand* v. *Amrahlal Bechardas, I. L. R. 3 Bom. 174,* referred to and followed. RATHINAVELU MUDALIAR *v.* KOLANDAVELU PILLAI (1906) . . . . I. L. R. 29 Mad. 511

PRESIDENCY MAGISTRATE.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 203, 437, 439.
I. L. R. 33 Calc. 1282

PRESS AND REGISTRATION OF BOOKS ACT (XXV OF 1867), S. 18.

See COPYRIGHT ACT (XX OF 1847).
I. L. R. 33 Calc. 571

PRESUMPTION.

See BENGAL TENANCY ACT, S. 106.
10 C. W. N. 908

See LETTERS OF ADMINISTRATION.
10 C. W. N. 432

See REVENUE SALE LAW, S. 37.
10 C. W. N. 503

PRESUMPTION OF DEATH.

———*Evidence Act (I of 1872), ss. 107, 108—Disappearance of heir in distribution of estate of Mahomedan—Claim by son of missing man to share in estate of grandfather—Onus of proof—Matter of distribution of shares in estate referred by heirs to arbitration—Effect of arbitrator's award—Mahomedan law.*—The appellant through his father, one of the children of a Mahomedan, claimed a share in the property of his grandfather, who died in 1884. It appeared that the father disappeared in 1870 and had not since been heard of. *Held*, that the onus was on the appellant to prove that his father survived the grandfather, failing which proof the share he claimed would go to the brother and sisters of the missing man as preferable heirs to the appellant. The grandfather's will being disputed, the distribution of his estate was referred to an arbitrator, who by his award made in 1888 reserved a share for the father of the appellant and his children. *Held*, that there was nothing in that fact or in the award which could be construed as evidence that the appellant's father was alive when the award was made; nor could it be regarded as an admission on the part of the other heirs, nor as a finding by the arbitrator that he was then alive, the reservation of a share for a missing man being only in accordance with Mahomedan law. MOOLLA CASSIM *v.* MOOLLA ABDUL RAHIM (1905) . I. L. R. 33 Calc. 178

PREVIOUS CONVICTION.

See CRIMINAL PROCEDURE CODE.
I. L. R. 28 All. 313

PRINCIPAL AND AGENT.

See CONTRACT . I. L. R. 30 Bom. 1

———*Implied authority—Authority of agent to borrow—Liability of principal—Contract Act (IX of 1872), ss. 187, 188.*—The general provisions of ss. 187 and 188 of the Contract Act would no doubt authorize an agent to borrow money, if necessary, but such provisions are subject to modifications in particular cases, specially where the transactions do not prove anything in favour of an implied authority to borrow. FERGUSON *v.* UM CHAND BOID (1905) . I. L. R. 33 Calc. 343

PRINCIPAL AND AGENT—*concluded.*

PRINCIPAL, LIABILITY OF.

See PRINCIPAL AND AGENT.
I. L. R. 33 Calc. 34

PRIORITY.

See MORTGAGE I. L. R. 33 Calc. 41
10 C. W. N. 276, 1010

PRIVATE SALE.

See CIVIL PROCEDURE CODE.
I. L. R. 30 Bom. 575

See PRACTICE . I. L. R. 30 Bom. 109

PRIVY COUNCIL.

See CIVIL PROCEDURE CODE.
I. L. R. 28 All. 337
10 C. W. N. 545, 564

See HINDU LAW . . 10 C. W. N. 95

See PRACTICE 10 C. W. N. 225, 230
I. L. R. 23 All. 215, 219

———*Appeal—Agency Courts in Kathiawar——Governor of Bombay in Council—Relation of Kathiawar to the British Crown and nature of extent of control exercised over it—Suits, Civil and Political—Political Jurisdiction—Order of a King's Court injuriously affecting person not a British subject—King in Council, right of redress by.*—The Province of Kathiawar is not wholly British Indian territory. The relation of the Kathiawar States to the British Crown was that the Chiefs paid a forced tribute, but were otherwise independent. Political control was largely exercised over them, but the intervention was only with the object of maintaining peace, good order, and security: there was no assertion of territorial sovereignty; and no legislative power over the province was claimed. The nature and extent of the control exercised by the British Indian authorities over the administration of justice in Kathiawar were that all arrangements were carried out, not by legislative action, but by orders or resolutions of the Executive Government. In cases within the jurisdiction of the Chiefs, there was no judicial appeal to the British authorities. The Agency Courts dealt with the classes of cases withdrawn from the jurisdiction of the Chiefs, the functions of the Political Agent being not so much judicial as "diplomatic and controlling." Appeals from the Agency Courts lay, not to the High Court, but to the Governor of Bombay in Council, and thence to the Secretary of State for India, the whole system showing that the intention of Government was, and always had been, that the jurisdiction exercised in connexion with Kathiawar

PRIVY COUNCIL *-continued.*

should be political and not judicial in its character Two suits were instituted in, and determine by the Agency Courts in Kathiawar and by the Governor of Bombay in Council; one, to enforce a mortgage, was classed as a "Civil" case, and the other, to redeem a mortgage, was merely on account of the rank of the parties classed as "political." *Held*, that there was, for the purposes of these appeals, no substantial distinction between them, and that the relation of the Kathiawar States to the British Crown and the nature and extent of the control over them being as above, no appeal lay from the orders made in such suits to the King in Council. *Semble.*—If a Court administering justice on the King's behalf makes an order, judicial in its nature, by which some one is unjustly and injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong, merely by the fact that he is not the King's subject. HEMCHAND DEVCHAND *v.* AZAM SAKARLAL CHHOTAMLAL (1905) **I. L. R. 33 Calc. 219**
s.c. 10 C. W. N. 361
L. R. 33 I. A. 1

——— *Special leave to appeal—Suit for damages for more than R10,000 dismissed on appeal—No assessment of amount of damages by first Court—Civil Procedure Code (Act XIV of 1882), s. 596—Refusal of leave to appeal by High Court—Value of subject-matter in dispute.*—The Judicial Committee granted special leave to appeal in a case in which the petitioner had sued for R30,000, but his suit had been dismissed without any assessment of the amount of damages recoverable, and the High Court had, under s. 596 of the Civil Procedure Code, refused leave to appeal to the Privy Council on the ground that the petitioner had not shown that the case was necessarily of the proper appealable value. IKRAMUL HUQ *v.* WILKIE (1906)
I. L. R. 33 Calc. 893
s.c. L. R. 33 I. A. 106
11 C. W. N. 946

——— *Appeal to Privy Council—Stay of proceedings pending appeal—Application to be made to the Court in India in the first instance—Conditional order for stay—Costs.*—Application for stay of proceedings pending an appeal to the Judicial Committee ought always to be made, in the first instance, at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details, which the Judicial Committee cannot possess on an interlocutory application. Application was granted in the special circumstances of this case, on the appellant giving an undertaking for expediting the hearing of the appeal, and leave was given to the respondent to apply to the Court in India for the appointment of a Receiver or for payment by the appellant of a reasonable amount in Court or any other relief as he may be advised. Appellant to pay the costs of the application in any event. VASUDEVA MODELIER *v.* SADAGOPA MODELIER (1906).
10 C. W. N. 945

PRIVY COUNCIL—*concluded.*

——— *Privy Council—Concurrent decisions on fact—Disagreement of lower Courts as to circumstances leading up to conclusions—Appellate Court not affirming decision of first Court on all issues in the case.*—Where both Courts below had come to the same conclusion on the two main questions of fact in the case, which were sufficient to dispose of it, but had not agreed on all the circumstances which led up to such conclusion, and the Appellate Court had either differed from the first Court on other questions or had not decided them, the Judicial Committee, referring to the case of *Umrao Begum* v. *Irsad Husain, L. R. 21 I. A. 163, 166, I. L. R. 21 Calc. 997*, declined to depart from the general rule as to concurrent findings of fact by the lower Courts. SANWAL SINGH *v.* SATRUPA KUNWAR (1905) . . . **I. L. R. 28 All. 215**
s.c. 10 C. W. N. 230
L. R. 33 I. A. 53

——— *Privy Council—Concurrent decisions on fact—Disagreement of lower Courts as to circumstances leading up to conclusions—Appellate Court not affirming decision of first Court on all issues in the case.*—Where there are concurrent conclusions by both the lower Courts on questions of fact sufficient for the disposal of the case, the mere fact that the two Courts do not agree on all the steps which lead to one and the same conclusion is no reason for disregarding the rule as to concurrent findings of fact. But the fact that the Courts have differed on some important, though subordinate, questions is a matter to be taken into consideration in determining whether the evidence before the lower Courts should be reviewed in detail. CHITPAL SINGH *v.* BHAIRON BAKHSH SINGH (1906)
I. L. R. 28 All. 219
s.c. 10 C. W. N. 225

——— *Execution of decree—Privy Council—Restoration of property alienated pending appeal to the Privy Council—Procedure.*—Pending an appeal to His Majesty in Council, certain property forming part of the subject-matter of the suit in which such appeal had been preferred was sold by auction in execution of a money decree against the plaintiff, who held the decree of the High Court under appeal. The defendant's appeal to the Privy Council was decreed. *Held*, that the successful appellant was entitled to recover the property sold as above mentioned by means of an application under s. 244 read with s. 610 of the Code of Civil Procedure, and this right was not affected by the fact that the auction purchasers were not parties to the decree of the Privy Council. *Gulzari Lal* v. *Madho Ram, I. L. R. 26 All. 447*, followed. *Bhagwati Prasad* v. *Jamna Prasad, I. L. R. 19 All. 136*, and *Sadiq Husain* v. *Lala Prasad, I. L. R. 20 All. 139*, distinguished. GARUDHUJ PRASAD SINGH *v.* BAIJU MAL (1906).
I. L. R. 28 All. 337

PROBATE.

——— *Effect of probate—Will—Will of Mahomedan lady—Probate and Administration*

PROBATE—*continued.*

Act (V of 1881)—Executor of Mahomedan will—Will of Mahomedan lady confirming release obtained from her by undue influence—Suit by heirs to set aside release—Release—Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Estoppel—Act V of 1881, ss. 4, 59 and 88.—The Supreme Courts in India never applied the English rules as to the necessity for probate to Hindu or Mahomedan wills, nor did they attribute to such probates, when granted, the English doctrines as to the operation of probate. Under that system a Hindu or Mahomedan executor took no title to property merely as such by virtue of the probate. In the case of Mahomedan executors such a title was created for the first time by the Probate and Administration Act (V of 1881). Since by Mahomedan law a testator has power only to dispose of one-third of his property, an executor of a Mahomedan will, who had obtained probate under Act V of 1881, is a bare trustee for the heirs as to two-thirds of the estate, when realized, and an active trustee as to one-third for the purposes of the will; and of these trusts one is created by the Act and the Probate irrespective of the will, and the other by the will established by the probate. The effect of probate of a Mahomedan will granted under that Act is limited to the effect given to it by the terms of the Act itself. These terms (contained in s. 59, and s. 4 supplemented by s. 88) cannot be applied so as to give the probate the effect of an estoppel as to the will and its contents. The will of a Mahomedan lady, widow of the late King of Oudh, confirmed a release, which she had executed in favour of the principal defendant, who had been for some years in her household as her confidential agent and manager of her affairs, by which she declared that certain property he had obtained from her was a free and absolute gift and that neither she nor her heirs had any claim or demand on him in respect of it. Probate of the will was granted to the Administrator-General, the executor appointed by it, the grant being opposed by her heirs the plaintiffs, who pending the probate proceedings instituted a suit, in which they claimed to set aside the release and prayed for an account and for two-thirds of the property of the testatrix. *Held,* reversing the decision of the High Court, that the grant of probate did not, under the provisions of the Probate and Administration Act, create any such estoppel as to prevent the plaintiffs from denying the validity of the confirmation of the release to the defendant contained in the will. It was also contended that an estoppel arose from the decision in the proceedings for probate, which constituted a *res judicata* under s. 13 of the Civil Procedure Code (Act XIV of 1882), but the probate proceedings were not in evidence, and their Lordships held that in their absence there was no sufficient evidence to support the estoppel. KURRUTULAIN BAHADUR *v.* NUZBAT-UD-DOWLA ABBAS HOSSEIN KHAN (1905).

I. L. R. 33 Calc. 116

——— *Letters of administration—Revocation of grant of probate or letters of administration—Just cause—Grant obtained fraudulently—Probate and Administration Act (V of 1881), s. 50—Res judicata—Parties—Same parties or their representatives—Decree against Hindu widow—Reversioners—Fraud.*—After the grant of probate or letters of administration with the will attached has been made the only procedure provided by the law for the revocation of such a grant is that laid down in s. 50 of the Probate and Administration Act. Where the petitioner applied for the revocation of a grant of letters of administration with the will annexed on the ground of fraud, the fraud originally alleged being collusion between the parties to the proceedings, in which the grant was made *Held,* that having failed to make out the case of fraud she was not entitled to go into the question whether the will was a forgery, and that her application for revocation was rightly dismissed. A decision dismissing an application made by the widow and heiress of the deceased testator for revocation of letters of administration with the will annexed, which had been granted to his mother, is binding on the daughter, who would, if the will were set aside, be the next heir, unless the latter can make out that there was collusion between the mother and the widow of the testator. DURGAGATI DEBI *v.* SAURABINI DEBI (1906) . **I. L. R. 33 Calc. 1001**
s. c. 10 C. W. N. 955

PROBATE AND ADMINISTRATION ACT (V OF 1881).

——— ss. 3, 7—*Executor by implication—Bequest to an idol—Right of shebait to take out probate.*—Where a testator had bequeathed the bulk of his estate for the sheba of a thakur and made certain other dispositions in regard to the rest of the property. *Held,* on the construction of the Will, that his wife, whom he had appointed *shebait,* having been confided with the execution of the Will, was executor by implication, and as such entitled to take out probate of the will. *Brojo Chunder Goswami* v. *Raj Kumar Roy, 6 C. W. N. 310,* referred to. KRIPAMOYEE DASSI *v.* MOHIM CHANDRA DUTT (1906) . . . **10 C. W. N. 232**

——— s. 45.

See LETTERS OF ADMINISTRATION.
10 C. W. N. 432

——— s. 50—*Revocation of probate or letters of administration—Issues in such proceeding—Practice—Just cause—Hindu widow, order against, binds reversioner.*—Where an application was made for revocation of letters of administration with the Will of the deceased annexed and it was prayed that the Will should be proved before the applicant: *Held,* that until the applicant made out a case for revocation, the question of the genuineness of the Will could not be gone into. English practice and practice of mofussil Courts in India distinguished. *Held,* further, that a previous application for revocation by the widow of the deceased having failed, that decision bound reversioner, and the latter's application for revocation could not succeed except upon proof that the previous proceeding had

PROBATE AND ADMINISTRATION ACT (V OF 1881)—*continued.*

been collusive and fraudulent. *Katama Natchier* v. *Raja of Shivagunga, 9 M. I. A. 539, 604, Pertab Narain Singh* v. *Triloki Nath Singh, I. L. R. 11 Calc. 186*, relied on. DURGAGATI DEBI v. SOURABINI DEBI (1906) . . . **10 C. W. N. 955**
s.c. I. L. R. 33 Calc. 1001

———— **ss. 105, 108**—*Specific legacy, mortgage of—Charge—Debts.*— When a person takes a legacy under a Will she takes subject to the debts due from the estate, but a mortgage of the property created by the legatee is not necessarily invalid, even if there are debts due from the deceased. *P* by a Will appointed *A*, his widow, as his executrix and gave her a specific legacy in respect of a certain piece of land, which she mortgaged to defendant No. 3, who sold the mortgage right to the plaintiff; subsequently the property was sold in execution of a decree obtained against *P*'s representatives (*A* having died in the meantime) on account of a debt due from *P*'s estate, and the property was purchased by defendant No. 2. Plaintiff asked relief against this defendant. The lower Appellate Court held that the mortgage by *A* was invalid having regard to the provisions of s. 105 of the Probate Act: *Held*, that the mortgage was not necessarily invalid. That the decree in execution of which the property was sold and purchased by defendant No. 2 was simply a money decree and no charge upon the property bequeathed was created thereby, and the purchaser in execution could not claim a valid charge upon the property in question as against the mortgagee. AMBIKA CHARAN DUTT *v.* MUKTO KISORI (1905) . . . **10 C. W. N. 38**

———— **ss. 128, 130, 131**—*Interest allowable on demonstrative legacies—Demonstrative legatee, right of, to resort to general assets—Will, construction of—'Labham,' meaning of—Transfer of Property Act (IV of 1882), s. 35 (b)—Exception not applicable where debt not the whole consideration.*—The word 'Labham' is generic and covers different kinds of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest, and dividends and income from immoveable property, especially where other portions of the will show such to have been the intention of the testator. The exception in paragraph (*b*) of s. 135 of the Transfer of Property Act will apply only where the whole of the consideration for the transfer is a debt due by the transferor. The rule that in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended will not apply where there are directions to the contrary by the testator. Under the English law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death. *Mullins* v. *Smith, 1 Drewry & Smale's Rep. 204* approved and followed. *Lord Londesborough* v. *Somerville, 19 Beav. 295*, approved and followed. The same is the law in India and the absence of a distinct provision in ss. 128, 130 and 131 of the Probate and Administration Act with respect to interest

PROBATE AND ADMINISTRATION ACT (V OF 1881)—*concluded.*

on such legacies does not imply an intention to disallow interest in such cases. CHINNAM RAJAMANNAR *v.* TADIKONDA RAMACHANDRA RAO (1905).
I. L. R. 29 Mad. 155

PROCEDURE.

See CRIMINAL PROCEDURE CODE.
See POSSESSION . **I. L. R. 33 Calc. 68**
See PRACTICE . **I. L. R. 30 Bom. 109**

PROFESSIONAL MISCONDUCT.

See ADVOCATE . **I. L. R. 33 Calc. 151**

PROMISSORY NOTE.

See ACT II OF 1899.
I. L. R. 28 All. 289

———— *Collateral covenant not to sue for limited time no bar to suit on—Indorsee with notice of covenant may sue.*—A collateral covenant not to sue for a limited time on a promissory note does not suspend the right of action on the note and cannot be pleaded in bar to an action on the note. *Thimbleby* v. *Barron, 3 M. & W, 210*, referred to and followed. *Ray* v. *Jones, 9 C. B. R. N. S. 416*, referred to and followed. The payee of the promissory note executed an agreement in the following terms:—"You will ever from the 1st of May be paying interest to me on account of the (promissory) note for ₹5,000 executed this day by you in my favour, the interest for every month being sent on the first of the next month. I shall take the above rupees five thousand from you after giving jivanamsam (maintenance money) to my mother-in-law, and obtaining a release bond; or I will take the said rupees five thousand after the lifetime of my mother-in-law." *Held*, that this agreement was only a collateral covenant not to sue for a limited time and was no bar to an action by an indorsee with notice of the agreement. SOMASUNDARAM CHETTIAR *v.* NARASIMHA CHARIAR (1905).
I. L. R. 29 Mad. 212

———— *Promissory note on account of pre-existing loan—Action maintainable on original consideration, even if note unstamped and inadmissible.*—Where a bill or note is not itself the original contract, but is executed on account of a pre-existing independent obligation complete in itself, an action on the original obligation is maintainable without regard to such bill or note, if it is not paid at maturity, provided the party taking the bill or note, has done nothing with it, which would render the debtor liable on it to third parties and the inadmissibility in evidence from any cause of such bill or note will not affect the maintainability of the suit. It will be otherwise, if the original cause of action is the bill or note itself. *Sheikh Akbar* v. *Sheikh Khan, I. L. R. 7 Calc. 256*, followed. *Pothi Reddi* v. *Velayudasivan, I. L. R. 10 Mad. 94*, distinguished.

PROMISSORY NOTE—*concluded.*

YARLAGADDA VEERA RAGAVAYYA *v.* GORANTLA RAMAYYA (1905) . . **I. L. R. 29 Mad. 111**

PROMISSORY NOTE, SUIT ON.

See HINDU LAW. **I. L. R. 28 All. 288**

PROVINCIAL SMALL CAUSE COURT ACT (IX OF 1887).

I. L. R. 28 All. 292

——— **s. 23**—*Exercise of power under s. 23 gives Court jurisdiction to try suit as an original suit.*—Where a question of title which a Court of Small Causes cannot finally determine is involved in a small cause suit, the Court has discretionary power under s. 23 of Act IX of 1887 to return the plaint to be presented to a Court having such jurisdiction. The latter Court thereupon acquires jurisdiction to try the suit as an original suit and is bound to receive the plaint and try it as such. *Mahamaya Dosya* v. *Nitya Hari Das Bairagi, I. L. R. 23 Calc. 425,* followed. SUBBAROYADU *v.* GANGAYYA (1906) **I. L. R. 29 Mad. 329**

PUBLIC CHARITY.

See CIVIL PROCEDURE CODE. **I. L. R. 30 Bom. 603**

PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT VII OF 1880).

See CERTIFICATE . **I. L. R. 33 Calc. 84**

——— **ss. 2, 17, 24**—*Sale in execution of certificate—Jurisdiction of Revenue Courts—Appeal to Commissioner—Limitation—Suit in Civil Courts to set aside sale—Remedy of purchaser, when sale is set aside by Revenue authorities without hearing him.*—A certificate granted by the Revenue Court in respect of a fine imposed on the respondent for failure to comply with a notice issued under s. 16 of the Bengal Cess Act (Bengal Act IX of 1880) was executed and his village sold on 9th September 1893 under the Public Demands Recovery Act (Bengal Act VII of 1880) and purchased by the appellant, who was put into possession on 5th December 1893. The respondent on 2nd January 1894 after the expiry of the sixty days allowed for that purpose, appealed to the Commissioner to cancel the sale as irregular, fraudulent and collusive. The Commissioner ordered an enquiry whether the respondent had been prevented by fraud from taking any steps in the matter, and against that order the appellant appealed to the Board of Revenue, who on 5th May 1895, acting under the powers of revision given them by Act VII of 1880, set aside the certificate under which the sale was held; and on 4th February 1896 the Commissioner passed a formal order annulling the sale on the ground of fraud, but without hearing the purchaser. In a suit in the Civil Court to set aside the sale brought by the respondent pending the above proceedings, which

PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT VII OF 1880)—*concluded.*

suit was decided on the footing of the orders made by the Revenue authorities, which were put in as evidence in the suit: *Held* (upholding the decisions of the Courts below) (*a*) that under ss. 17 and 24 of Bengal Act VII of 1880, the revenue authorities had ample jurisdiction to make the orders on which decrees of the Civil Court were based, the former section applying to orders made after as well as to those made before sale in execution of certificates issued under the Act; (*b*) that as the Commissioner was acting in the exercise of his revisional jurisdiction under s. 17 of the Act the appeal to him was not barred by the provisions as to limitation in ss. 12 and 16; (*c*) that the proper remedy of the appellant, if aggrieved by the order setting aside the sale, was to apply to the Revenue authorities for a re-hearing and that it was now too late to ask for a remand on that ground. GANESHWAR SINGH *v.* GANESH DAS (1906).

I. L. R. 33 Calc. 1178
s.c. L. R. 33 I. A. 135

——— **ss. 3, 7**—*Executor by implication—Bequest to an idol—Right of shebait to take out probate.*—Where a testator had bequeathed the bulk of his estate for the *sheba* of a *thakur* and made certain other dispositions in regard to the rest of the property. *Held,* on the construction of the Will, that his wife, whom he had appointed *shebait* having been confided with the execution of the Will was executor by implication, and as such entitled to take out probate of the Will. *Brojo Chunder Goswami* v. *Raj Kumar Roy 6 C. W. N. 310,* referred to. KRIPAMOYEE DASSI *v.* MOHIM CHANDRA DUTT (1905) . **10 C. W. N. 232**

——— **ss. 7, 15, 31**—*Civil Procedure Code (Act XIV of 1882), s. 244—Certificate-sale—Irregularity—Right of suit.*—The mere fact that a greater sum is claimed as due in a certificate than is in fact due does not make the certificate and notice bad. S. 244 of the Civil Procedure Code is applicable, when the only grounds alleged for setting aside a sale are irregularities not in the proceedings anterior to the certificate or in the certificate, which is sought to be executed, but in the execution proceedings subsequent to it. UMED ALI BHUYA *v.* RAJ LAKSHMI DEBYA (1905) . **10 C. W. N. 130**

——— **s. 17.**

See SALE . . **10 C. W. N. 969**

PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT I OF 1895).

——— **s. 21**—*Suit to set aside a sale in execution of a certificate—Civil Procedure Code (Act XIV of 1882), ss. 223, 311, 312—Material irregularity—Order sending certificate to another Court for execution—Void sale.*—Where an order sending a certificate made under the Public Demands Recovery Act to another Court for execution was not authorized by s. 223 of the Code of Civil Procedure, and the latter Court proceeded to execute the certificate by selling certain property: *Held,* that the Court pur-

PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT I OF 1895)—*concluded.*

porting to sell the property had no power to do so, the proceedings being vitiated *ab initio* on the ground that there was no power to send the certificate for execution to that Court and that s. 312 of the Code of Civil Procedure was no bar to the suit for setting aside the sale. *Held*, further, that s. 312 of the Code of Civil Procedure does not apply to proceedings in execution of certificates under Bengal Act I of 1895. *Ramrup Sahay* v. *Khushal Misser, 6 C. W. N. 610, Janki Das* v. *Ramgolam Sahu, 6 C. W. N. 381, Raghubans Suhai* v. *Phool Kumari, I. L. R. 32 Calc. 1130*, referred to. Observations in *Ram Taruck Hazra* v. *Dilwar Ali, I. L. R. 29 Calc. 94, footnote*, approved. GIRISH CHANDRA v. GOLAM KARIM (1906) . **I. L. R. 33 Calc. 451 s.c. 10 C. W. N. 347**

PUBLIC POLICY, AGREEMENT OPPOSED TO.

See ACT IX OF 1872, s. 23.
I. L. R. 28 All. 716

PUBLIC RELIGIOUS TRUST.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 10, 539.
I. L. R. 33 Calc. 789

PUBLIC TRUSTS.

See CIVIL PROCEDURE CODE.

PUJA KHARACH.

See ABWAB . **I. L. R. 33 Calc. 693**

PURCHASER.

See SALE FOR ARREARS OF RENT.
I. L. R. 33 Calc. 113

PURCHASER OF A TENURE.

See ADMINISTRATION BOND.
10 C. W. N. 673

See BENGAL TENANCY ACT, s. 170.
10 C. W. N. 438

See HINDU LAW—MAINTENANCE.
10 C. W. N. 1074

See REVENUE SALE LAW, s. 3.
10 C. W. N. 497

PUTNI TENURE.

See RENT . **I. L. R. 33 Calc. 140**

PUTNIDAR.

See RENT . **I. L. R. 33 Calc. 140**

R

RAILWAYS ACT (IX OF 1890).

——— ss. 3, 6, 77 and 140—*Notification of claim for refund as condition precedent to suit—*

RAILWAYS ACT (IX OF 1890)—*concluded.*

To whom such notification must be given.—Where the plaintiff sued a Railway Company for recovery of money alleged to have been taken by the defendant as freight upon certain goods in excess of what was legally due, and before filing the suit gave notice of her claim for a refund to the General Traffic Manager, it was *held* that this was not a compliance with the provisions of the Indian Railways Act, 1890, and the suit could not be maintained. *Periannan Chetti* v. *South Indian Railway Company, I. L. R. 22 Mad. 137, The Secretary of State for India in Council* v. *Dipchand Poddar, I. L. R. 24 Calc 306, East Indian Railway Company* v. *Jeth Mull Ramanand, I. L. R. 26 Bom. 669*, and *Bombay, Baroda and Central India Railway Company* v. *Sauti Lal, I. L. R. 26 All. 207*, followed. GREAT INDIAN PENINSULAR RAILWAY COMPANY v. CHANDRA BAI (1906) . . . **I. L. R. 28 All. 552**

RAIYAT.

See LANDLORD AND TENANT.

REASONABLE DOUBT.

See CIVIL PROCEDURE CODE.
I. L. R. 30 Bom. 226

RECEIVER.

See LIMITATION ACT.

——— *Practice—Suit in ejectment by Receiver—Discharge of Receiver before termination of suit—Devolution of interest—Civil Procedure Code (Act XIV of 1882), s. 372—Mortgage—Accession to mortgaged property—Transfer of Property Act (IV of 1882), ss 8, 70—Lease by mortgagor—Sub-lease pendente lite—Rights of mortgagee.*—Somjee, a Khoja merchant, died in 1885, leaving as his survivors four sons by his first wife (who predeceased him), his second wife Labai, and four sons by Labai. By his will, Somjee gave the whole of his moveable and immoveable property to his sons by his first wife, directing them out of such property to give to Labai and his sons R30,000 within six years of his death. On the 12th January, 1899, Somjee's sons by his first wife mortgaged certain of the properties to the Bank of Bombay. In 1903, the Bank having advertised such properties for sale under a power reserved to them by the mortgage deed, Somjee's sons by Labai (who had since died) brought a suit No. 554 of 1903 against Somjee's sons by his first wife and the Bank of Bombay, claiming that the properties could only be sold subject to the charge in their favour. On the 14th January 1904, the Bank assigned the mortgage to Dwarkadas. On the 26th January 1904, Mr. Macleod was appointed a Receiver by the Court. On the 24th February 1904, the Receiver was authorised to file an ejectment suit, where necessary. On the 18th March, 1904, the Receiver as plaintiff No. 1 and Dwarkadas as plaintiff No. 2 filed the present suit to eject Kissan, the first defendant, from a portion of the property mortgaged to the Bank.

RECEIVER—*concluded.*

Kissan claimed to be in possession under a lease from Goolam, the second defendant, one of the four sons of Somjee by his first wife. After the commencement of the suit, Suit No. 554 of 1903 was disposed of in favour of the Bank of Bombay and the Receiver was discharged. The first defendant contended that Dwarkadas had no right to join the Receiver in bringing the suit, that the moment the Receiver was discharged, his power to sue and with it the suit itself came to an end. *Held*, that the Bank or its assignee Dwarkadas had a right to come in under s. 372 of the Code of Civil Procedure and apply that the suit be continued by one or the other of them. No such application was in fact made because Dwarkadas was already on the record as plaintiff No. 2. The joinder of Dwarkadas as a co-plaintiff with the Receiver, though it was not perhaps, strictly speaking, legal at the time, did not constitute a misjoinder. *Held*, also, that a theatre, erected by the mortgagors on the land, after the execution of the mortgage, was, in the absence of a contract to the contrary, included in the mortgage. The Transfer of Property Act makes no distinction between freehold and leasehold property for the purposes of the rule of law embodied in ss. 8 and 70 of the Act. In this respect the Act reproduces the English law, which is, that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed. *Held*, also, that if a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor, who granted it, the paramount title of the mortgagee may be asserted against both of them. MACLEOD *v.* KISSAN (1904) . . . I. L. R. 30 Bom. 250

——— *Joint property—Money decree against joint owners—Mortgage—Attachment—Decree—Attaching creditor's right to property over mortgages.*—Where a receiver of joint property mortgaged that property to another after a money decree had been obtained against the owners, but had executed the mortgage previous to the attachment. *Held*, that the attaching creditors were not entitled to priority over the mortgagee. HERUMBO NATH BANERJEE *v.* SATISH CHANDRA MUKERJEE (1905). I. L. R. 33 Calc. 1175

RECEIVING OFFICER

See DISTRICT MUNICIPAL ACT.

RECTIFICATION.

——— *Specific Relief Act (I of 1877), s. 31—Sale—Suit for specific performance—Mutual mistake - Clear proof.*—To establish a right to rectification of a document it is necessary to show that there has been either fraud or mutual mistake. Under the terms of s. 31 of the Specific Relief Act (I of 1877), it is necessary that the Court should find it clearly proved that there was such mistake. "A

RECTIFICATION—*concluded.*

person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought." *Fowler* v. *Fowler, 4 D. and J. 250 at p. 264*, followed and applied. MADHAVJI *v.* RAMNATH (1906). I. L. R. 30 Bom. 457

RECORD OF RIGHTS, ENTRY IN.

See BENGAL TENANCY ACT, s. 103A. 10 C. W. N. 908

REDEMPTION.

See CIVIL PROCEDURE CODE. 10 C. W. N. 115

See MORTGAGE. 10 C. W. N. 592, 778
I. L. R. 33 Calc. 590

REDEMPTION SUIT.

See EVIDENCE ACT. I. L. R. 30 Bom. 426

REFERENCE.

See CIVIL PROCEDURE CODE. I. L. R. 30 Bom. 226

REFERENCE BY COLLECTOR.

——— *Land Acquisition Act (I of 1894), ss. 12 and 18—Notice by the Collector—Construction of statute—Meaning of word "immediately".*—*Held*, that the conditions prescribed by s. 18 of the ACT are the conditions to which the power of the Collector to make the reference is subject, and these conditions must be fulfilled before the Court can have jurisdiction to entertain the reference. IN RE LAND ACQUISITION ACT (1905) . I. L. R. 30 Bom. 275

REGISTRAR.

See ADMINISTRATION BOND. I. L. R. 33 Calc. 713

REGISTRAR OF THE SMALL CAUSE COURT.

See SANCTION TO PROSECUTE. I. L. R. 33 Calc. 193

REGISTRATION.

See GIFT . I. L. R. 33 Calc. 584

See VALUATION OF SUITS. I. L. R. 33 Calc. 1133

See WILL . . 10 C. W. N. 521

REGISTRATION—*concluded.*

——— *How far compromises in suits exempted from.*—A razinamah does not require registration only in regard to such of its stipulations and provisions as are incorporated with and given effect to by the order of the Judge. The provisions of the Registration Act will apply to terms in the razinamah, which are not so incorporated. *Pranal Anni* v. *Lakshmi Anni, I. L. R. 22 Mad. 508,* followed. PATHA MUTHAMMAL *v.* ESUP ROWTHER (1906).
I. L. R. 29 Mad. 365

REGISTRATION ACT (III OF 1877).
See LEASE.

——— **ss. 3, 17.**
See REGISTRATION.
I. L. R. 33 Calc. 502

——— **ss. 3, 17**—*Lease—Agreement to lease—Amalnama—Evidence, admissibility of—Ejectment—Right to possess.*—By certain unregistered *amalnamas* tenable for nine years the landlord agreed that upon the defendant fulfilling certain conditions mentioned in the *amalnama* during that period, he would grant a lease to the defendant. No lease was, however, granted in the terms of the *amalnamas* and the defendant was allowed to hold on the lands for eleven years, after the expiration of the nine years, upon payment of rent. In a suit for ejectment:—*Held,* that there being no absolute agreement on the part of the landlord to lease the lands, the *amalnamas,* though unregistered, were admissible in evidence, and that the defendant had such an interest in the property as would disentitle the plaintiff to eject him as a trespasser. *Syed Sufdar Reza* v. *Amjad Ali, I. L. R. 7 Calc. 703,* distinguished. DWARKA NATH SAHA *v.* LEDU SIKDAR (1906) . . . **I. L. R. 33 Calc. 502**

——— **s. 17.**
See LIMITATION ACT (XV OF 1877), ss. 19, 22 . . **I. L. R. 33 Calc. 613**

——— **s. 17**—*Registration—Sale of standing timber—Immoveable property.—Held,* that a document, which purported to be a "theka" of a certain portion of a forest "for all kinds of trees" for two years was not a document conveying an interest in immoveable property and did not require to be registered. *Seeni Chettiar* v. *Santhanathan Chettiar, I. L. R. 20 Mad. 58,* distinguished. MATHURA DAS *v.* JADUBIR THAPA (1905) . **I. L. R. 28 All. 277**

——— **s. 17**—*Agreement to convey and possession given to transferee—Conveyance by registered deed to transferee, who has notice of previous agreement—Estoppel.*—It was agreed amongst certain successful plaintiffs, who by a decree of Court had become entitled to a large estate, that a certain relative, who had helped them in their suit, should have a share in the property, and this agreement was carried out to the extent that this person's name was entered in the village papers as a co-sharer and he was put into possession by consent of the other co-sharers, but no conveyance of the share was executed and registered. Subsequently one of the original donors purported to sell the share so assigned to a person, who had notice of the terms upon which it was held by the original donee. *Held,* that this sale, even though carried out by means of a registered instrument, was ineffectual as against the rights of the original donee, inasmuch as both the vendor knew that in equity he could not have a title to convey, and the vendee also was aware that the vendor could not convey without committing a fraud on the original donee. *Benham* v. *Keane, 1 Johnson and Hemming, 685 at p. 702, Greaves* v. *Tofield, L. R. 14 Ch. D. 563,* and *Le Neve* v. *Le Neve, 3 Atk. 646,* referred to. ANNU MAL *v.* COLLECTOR OF BAREILLY (1906)
I. L. R. 28 All. 315

REGISTRATION ACT (III OF 1877)—*continued.*

——— **s. 17**—*Registration—Compromise of suit embodied in a decree.*—In a suit for possession of certain plots of land reference was made as part of the evidence in the case, to a compromise in a previous suit relating to other lands, but which dealt also with the lands in suit and had been incorporated into the decree of the Court in the previous suit. *Held,* that such compromise did not require registration and was admissible in evidence. *Bindesri Naik* v. *Ganga Saran Sahu, I. L. R. 20 All. 171,* and *Pranal Anni* v. *Lakshmi Anni, I. L. R. 22 Mad. 508,* referred to. *Birbhadra Rath* v. *Kalpatara Panda, 1 C. L. J. 388,* considered. RAGHUBANS MANI SINGH *v.* MAHABIR SINGH (1906).
I. L. R. 28 All. 78

——— **ss. 17, 18, cls. (d) and (f), 21, 24 and 77**—*Transfer of Property Act (IV of 1882), ss. 6, 19 and 21—Indian Succession Act (X of 1865), s. 107—Document whereby a Mahomedan daughter relinquished her right of inheritance to her father's property Registration—Refusal to register on the ground that the document did not contain sufficient description of property—Discretion of Registrar—Jurisdiction of Civil Court—Vested or contingent interest—"Spes Successionis"—Alteration not affecting the legal effect of the contract.*—A Mahomedan daughter executed in favour of her father a document under which, in consideration of her receiving R9,000, she relinquished her right of inheritance to the father's property and also to certain ornaments directed to be given to her by her mother. The document was presented for registration to the Sub-Registrar, who accepted the registration fee, which was endorsed on the document, and subsequently refused to register the document on the ground that its execution was denied and that it did not contain sufficient description of the immoveable property to which it related—ss. 35 and 21 of the Registration Act (III of 1877). On appeal to the Registrar, he held that the execution of the document was proved, but refused registration on the ground that the provisions of s. 21 had not been complied with. Thereupon a suit having been filed under s. 77 of the Registration Act (III of 1877) for a decree directing registration of the document,—*Held,* allowing the claim, that s. 21 of the Registration Act (III of 1877) did not apply. The document could not be treated as relating to property because it related to

REGISTRATION ACT (III OF 1877)— *continued.*

mere heirship: much less could it relate to immoveable property capable of being described and identified. Supposing that s. 21 was applicable and that the document related to immoveable property, then the conditions of the section were satisfied, because under the document the executant gave up her right of inheritance to such of her father's immoveable property as he might leave on his death and that this is not only a sufficient, but the only description that could be given of the property.—*Held*, further, that the document did not fall within the category of any of the documents mentioned in s. 17 of the Registration Act (III of 1877). It fell within clauses (*d*) and (*f*) of s. 18 of the Act. It fell within clause (*d*) of s. 18, because there was a release by the executant of her right to certain ornaments to which she had a present right. It fell within clause (*f*) because it was a document under which the executant agreed to release her right as heir to her father and that belonged to a class of documents not mentioned in s. 17 and not falling within the preceding clauses of s. 18. Where a Sub-Registrar or Registrar receives a document and the registration fee, and endorses the payment on the document and issues a commission for taking evidence, he must be regarded as having exercised his discretion under s. 21 of the Registration Act (III of 1877) and accepted the document for registration. But even if there was at first no acceptance under that section, that being a matter in his discretion, the Court cannot, under s. 77 of the Act, question the subsequent exercise of such discretion. The discretion under s. 21 arises where a non-testamentary document "relates to immoveable property." Where it does not so relate, the section cannot apply and the discretion cannot arise. It is open for a Civil Court to enquire into such question in a suit under s. 77 of the Act. The right of a son or daughter or other heir of a person to inherit his property is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definitions of "a vested interest" in s. 19 of the Transfer of Property Act (IV of 1882), or of "a contingent interest" in s. 21 of the Act and s. 107 of the Indian Succession Act (X of 1865). So far from being a vested or a contingent right, or a right in present or in future, it is, in the language of clause (*a*) of s. 6 of the Transfer of Property Act (IV of 1882), "the chance of an heir-apparent succeeding to an estate, or "a mere possibility of succession which cannot be transferred. A mere *spes successionis* is unknown to, and not recognised by Mahomedan law. An alteration to be material for the purpose of registration must affect the legal effect of the contract so as to make it cease to be the same instrument. ABDOOL HOOSEIN *v.* GOOLAM HOOSEIN (1905).

I. L. R. 30 Bom. 304

——— **ss. 17, 48.**

See EQUITABLE MORTGAGE.

I. L. R. 33 Calc. 410

REGISTRATION ACT (III OF 1877)— *continued.*

——— **ss. 32, 33 and 87**—*Validity of registration—Power-of-attorney—Authority of registering officer.*—One Daulat Ram, after selling certain immoveable property to Musammat Ram Bai, the mother of the plaintiff, on the 6th August, 1900, sold the same property again on the 12th August, 1900, to the defendant. The latter sale-deed was duly registered on the 13th August, 1900, and on the same day the sale-deed of the 6th August, 1900, was presented for registration by a pleader acting under a power-of-attorney from Musammat Ram Bai. The power-of-attorney admittedly was not executed or authenticated in accordance with the provisions of s. 33 of the Registration Act. The registering officer, however, took no notice of the defect and after summoning Daulat Ram, who admitted execution, registered the sale-deed of the 6th August on the 17th November, 1900. *Held*, that the document of the 6th August had not been legally registered. The terms of ss. 32 and 33 of the Registration Act are imperative and proper presentation by an authorized agent is an indispensable foundation of the registering officer's jurisdiction; nor was the error of the Sub-Registrar a mere defect in procedure that could be cured by s. 87 of the Registration Act or by the fact that the executant, when summoned by the registering officer, consented to the registration of the sale-deed of the 6th August. *Mujib-un-nissa* v. *Abdur Rahim, I. L. R. 23 All. 233*, followed. ISHRI PRASAD *v.* BAIJNATH (1906).

I. L. R. 28 All. 707

——— ——— **s. 35.**

See GIFT . **I. L. R. 33 Calc. 584**

——— **s. 35**—*Registration—Deed of gift of immoveable property after death of the donor—Representative of deceased donor—Transfer of Property Act (IV of 1882), ss. 4, 123.*—Where the widow of a deceased person, who had executed a deed of gift, was his representative, she would be his representative within the meaning of s. 35 of the Registration Act, although she was also the donee under the deed, and would be qualified to admit the execution and so to render the registration of the deed proper and effectual. *Pakran* v. *Kunhammed, I. L. R. 23 Mad. 580*, referred to. S. 123 of the Transfer of Property Act is, by virtue of s. 4 of the Act, to be read as supplemental to the Indian Registration Act, and the expression "registered instrument," in s. 123 means an instrument registered in accordance with the provisions of the Indian Registration Act, and not necessarily one registered by the donor himself. *Nand Kishore Lal* v. *Suraj Prasad, I. L. R. 20 All. 392*, approved. Where a Hindu executed a deed of gift in favour of his wife and it was registered after his death on her admission, she being his representative, *Held*, that the deed was a registered instrument within the meaning of s. 123 of the Transfer of Property Act. BHABATOSH BANERJEE *v.* SOLEMAN (1906).

I. L. R. 33 Calc. 584

REGISTRATION ACT (III OF 1877)— *concluded.*

——— s. 50—*Act XIX of 1843, s. 2—Act XVI of 1864, s. 68—Registration—Registered and unregistered documents—Priority—Held,* that s. 50 of the Registration Act, 1877, did not give to a registered mortgage executed in 1900 priority over an unregistered mortgage executed in 1861. *Tirumala* v. *Lakshmi, I. L. R. 2 Mad. 147,* and *Desai Lallubai Jethabai* v. *Mundas Kuberdas, I. L. R. 20 Bom. 890,* followed. *Hickson* v. *Darlow, L. R. 23 Ch. D. 690,* referred to. HARGOVIND v. KISHAN KUNWAR (1906) . **I. L. R. 28 All. 607**

——— s. 77—*Suit to compel registration—Limitation—Limitation Act (XV of 1877), ss. 5 and 6.—Held,* that s. 5 of the Limitation Act, 1877, applies to a suit brought under s. 77 of the Registration Act, 1877, to compel registration of a document. *Beni Prasad Kuari* v. *Dharaka Rai, I. L. R. 23 All. 277,* followed. SURAJ BALI PRASAD v. THOMAS (1905). **I. L. R. 28 All. 48**

——— s. 77—*Decree directing registration—Decree not providing for period for registration—Non-presentation of document within thirty days of First Court's decree directing registration—Registration, validity of.*—S. 77 of the Registration Act does not enact that the documents, of which registration is directed by a decree made under the section, must be presented for registration within thirty days of the passing of the decree. In a suit under s. 77 of the Registration Act the decree of the first Court simply directed the document to be registered and said nothing about its presentation for registration within thirty days from the passing of the decree; after an unsuccessful appeal the document was presented for registration within thirty days from the passing of the decree on appeal and was registered. *Held,* that the validity of the registration of the document could not be questioned on the ground that the document had not been presented for registration within thirty days of the passing of the first Court's decree, the decree having imposed no condition to that effect. GOPINATH ADHIKARY v. GADADHAR DAS (1906) . . . **I. L. R. 33 Calc. 1020**

REGISTRATION ACT (V OF 1881).

See PROBATE . **I. L. R. 33 Calc. 116**

REGULATION VIII OF 1793.

——— s. 41.

See CHOWKIDARI CHAKRAN ACT, s. 50. **10 C. W. N. 598**

——— s. 41.

See CHAUKIDARI CHAKRAN LAND.

REGULATION XXV OF 1802.

See HINDU LAW . **10 C. W. N. 95**

REGULATION XVII OF 1806.

See MAHOMEDAN LAW. **I. L. R. 33 Calc. 496**

See MORTGAGE . **10 C. W. N. 778**

REGULATION V OF 1812.

See BENGAL TENANCY ACT, s. 74. **10 C. W. N. 527**

REGULATION V OF 1819.

See PUTNI TALUQ.

REGULATION VIII of 1819, s. 3, cl. (3).

See RENT . **I. L. R. 33 Calc. 140**

REGULATION VII OF 1822.

——— s. 9.

See WAJIB-UL-ARZ . **10 C. W. N. 730**

REGULATION XI OF 1825.

——— s. 4.

See LANDLORD AND TENANT. **I. L. R. 33 Calc. 444**

——— s. 4—*Alluvion—Gradual accession—Change of course of a river within a short space of time.*—Certain land belonging to village *P.* on the river Gomti was submerged, and after remaining submerged for a not very lengthened period again reappeared. But on its reappearance it was found to be on the opposite side of the river and adjoining village *T. Held,* that the land thus cut off from village *P.* could not be said to have become part of village *T.* by "gradual accession" within the meaning of s. 4 of Bengal Regulation No. XI of 1825, but was rather land merely separated from the village, of which it formed part, by a sudden change in the course of the river, and this being so, no change of ownership had occurred. "Gradual accession" or "alluvion" means an imperceptible increase; and land is said to be acquired by alluvion, when it is acquired so gradually that it cannot be said how much is added at any particular moment of time. *Lopez* v. *Muddun Mohun Thakoor, 13 Moo. I. A. 467,* and *Hursukai Singh* v. *Syed Lootf Ali Khan, L. R. 2 I. A. 28,* referred to. RAI KRISHAN CHANDRA v. SAIDAN BIBI (1905). **I. L. R. 28 All. 256**

——— s. 4, cl. 5.

See FISHERY . . **10 C. W. N. 540**

RELEASE.

See PROBATE . **I. L. R. 33 Calc. 116**

RELIGIOUS ENDOWMENTS ACT (XX OF 1863).

——— s. 7—*Rules under—Election—Giving consideration in return for votes, what amounts to—Payment by candidate of expenses to voters, who had undertaken to vote for him, disqualifies candidate.*—On general principles, as well as under rule 19 of the rules framed by the Local Government for the conduct of elections under s. 7 of the Religious Endowments Act XX of 1863, a candidate can be held to "give consideration in return for a vote" only when such consideration passes as the result of a bargain. Payment of train fare and carriage expenses by a candidate to voters, who had undertaken to vote for him, will constitute such payment and such candidate will be disqualified from being elected under the rule. It will be otherwise where the provision for payment is a unilateral act, which might be accepted and acted upon or ignored by the other party. The burden lies on the candidate so paying of proving that the payments were otherwise than in return for votes. *Cooper* v. *Slade, 6 H. L. C. 746*, referred to. *The Bolton Election Petition, 31 L. T. 194*, distinguished. KRISHNASWAMI AYYANGAR v. SIVASWAMI UDAYAR (1905) . **I. L. R. 29 Mad. 166**

——— s. 14.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 10, 539.
I. L. R. 33 Calc. 789

See MADRAS REGULATION (VII OF 1817.)

——— *Succession to management—Right of appointment in whom vested.*—*Held*, that in the absence of express directions by the founder of an endowment, the right to nominate the manager reverts to the heirs of the founder on failure of the persons expressly appointed. *Sheoratan Kunwari* v. *Ram Pargash, I. L. R. 18 All. 227*, approved. CHANDRANATH CHAKRABARTI v. JADABENDRANATH CHAKRABARTI (1906) . . . **I. L. R. 28 All. 689**

——— *Religious endowment, suit concerning—Person interested as worshipper can be added as party.*—Persons interested as worshippers in a public religious institution may be added as parties to a suit instituted by a trustee on behalf of the institution against third parties, if such a joinder is considered by the Court as desirable in the interests of the trust. *Narayanasami Gurukkal* v. *Irulappa, 12 M. L. J. 355*, followed. CHIDAMBARAM CHETTIYAR v. RANGACHARIYAR (1905).
I. L. R. 29 Mad. 106

RELIGIOUS SOCIETY.

See ACT XXI OF 1860, s. 20.

REMAND.

See AGRA TENANCY ACT (II OF 1901).

RENT.

See APPEAL . **I. L. R. 33 Calc. 580**

See BENGAL TENANCY ACT, s. 3, CL. (5).

See BENGAL TENANCY ACT, s. 52.
10 C. W. N. 46

See BENGAL TENANCY ACT, s. 170.
10 C. W. N. 547

See BENGAL TENANCY ACT, s. 188.
10 C. W. N. 78

See CO-SHARER LANDLORD.
10 C. W. N. 1042

See LANDLORD AND TENANT.

RENT SUIT.

See CIVIL PROCEDURE CODE, s. 13.
10 C. W. N. 820

REPRESENTATIVE.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 244, 583.
I. L. R. 33 Calc. 857
10 C. W. N. 247

RES JUDICATA.

See ACT XV OF 1877, s. 2, SCH. II ART. 11 . **I. L. R. 33 Calc. 720**

See CIVIL PROCEDURE CODE, s. 13.
10 C. W. N. 40.

See GUJARAT TALUKDARS ACT (BOMBAY ACT VI OF 1888).

See LIMITATION ACT (XV OF 1877).

——— *Civil Procedure Code (Act XIV of 1882), s. 13—Joint trial—"Matter directly and substantially in issue"—"Former suit"—Suits disposed of in one judgment—Title.*—*M* and *J*, two Mahomedan co-widows, brought two separate suits for recovery of their dowers from the estate of their deceased husband. A question was raised in these suits, whether two houses belonged to the estate of the husband. By consent of parties the Subordinate Judge tried both the suits together and disposed of them in one judgment, it being found that the two houses belong to *M*, as her separate property. But two separate decrees were drawn up in accordance with that judgment. *J* preferred an appeal to the District Judge against the decree in her own suit mainly on the ground that the conclusion arrived at by the Subordinate Judge in the suit of *M*, respecting the title of the two houses, was erroneous; but no appeal was preferred in *M*'s suit. At the hearing of this appeal a question was raised on behalf of *M*, the respondent, that the judgment in *M*'s suit not having been appealed against operated as *res judicata*. The District Judge overruled this plea, and allowed the appeal of *J*. On second appeal to the High Court:—*Held* (RAMPINI, *J.*, dissenting), that there was no bar of *res judicata* to the hearing of the appeal preferred by *J*. *Abdul Majid* v. *Jew Narain Mahto, I. L. R. 16 Calc. 233*

RES JUDICATA—*continued.*

referred to. MARIAMNISSA BIBI *v.* JOYNAB BIBI (1906) . . . . **I. L. R. 33 Calc. 1101 s.c. 10 C. W. N. 934**

——— *Causes of action—Suit on mortgage—Taking money decree on mortgage—Refusal of relief—Relief claimed, but not granted—Second suit for sale—Civil Procedure Code (Act XIV of 1882), s. 13, Explanation (3).*—Where a mortgagee had previously instituted a suit to enforce his security and was content in that suit to take merely a money decree, but failed to obtain satisfaction of the decree—*Held*, that having regard to s. 13, explanation (3) of the Code of Civil Procedure, the decree operated as *res judicata*, and he was not entitled to bring another suit to realize the debt by the sale of the mortgaged property. *Jonmenjoy Mullick* v. *Dossmoney Dossee, I. L. R. 7 Calc. 714*, and *Rajkishore Shaha* v. *Bhadoo Noshoo, I. L. R. 7 Calc. 78*, distinguished. SHIBU BERA *v.* CHANDRA MOHUN JANA (1906) . **I. L. R. 33 Calc. 849**

——— *Adjudication in previous suit between co-defendants, in active opposition, res judicata in subsequent suit between such defendants.*—An adjudication between co-defendants in a previous suit on a point actively contested between them, operates as *res judicata* in a subsequent suit between them, in which they are arrayed as plaintiff and defendant. *Zamorin of Calicut* v. *Narayanan Mussad, I. L. R. 22 Mad. 323*, followed. *Ramanuja Ayyangar* v. *Narayana Ayyangar, I. L. R. 18 Mad. 374*, distinguished. KANDIYIL CHERIYA CHANDU *v.* ZAMORIN OF CALICUT (1905) . **I. L. R. 29 Mad. 515**

——— *Bar only when jurisdiction concurrent as regards pecuniary value as well as subject matter—Effect of augmentation of claim by subsequent interest—Transfer of Property Act (IV of 1882), s. 85.*—A judgment in a previous suit does not operate as *res judicata* in a subsequent suit in respect of the same subject-matter, if the value of the matter of relief in the subsequent suit is above the pecuniary limits of the jurisdiction of the Court, which decided the previous suit. In order to create an estoppel the jurisdiction of the two Courts must be concurrent as regards pecuniary limit as well as subject-matter. *Rajah Run Bahadur Singh* v. *Mussumut Lachoo Koer, L. R. 12 I. A. 23*, followed. The augmentation of the claim in the first suit by subsequent accrual of interest will prevent the estoppel operating. *Gopi Nath Chobey* v. *Bhagwat Pershad, I. L. R. 10 Calc. 697*, distinguished. *Pathuma* v. *Salimamma, I. L. R. 8 Mad. 83*, distinguished. Mortgage suits do not form an exception to this rule and the Legislature cannot, in the absence of apt provisions, be presumed to have intended to modify the rule of *res judicata* by enacting s. 85 of the Transfer of Property Act. *Obiter*, s. 209 of the Code of Civil Procedure does not apply to mortgage decrees. GIRIYA CHETTIAR *v.* SABAPATHY MUDALIAR (1905). **I. L. R. 29 Mad. 65**

——— *Civil Procedure Code (Act XIV of 1882), s. 13—Consent decree—Fraud—Defence—*

RES JUDICATA—*continued.*

Limitation.—On the 4th June, 1893, the defendant signed an acknowledgment (Ruzu) for R11,534-15-0 in favour of the shop of Bakhatram Nanuram, represented in the suit by the plaintiff. On the 19th June, 1894, the defendant paid R400 cash, and a hundi for R600 and for the balance R10,534-15-0 he passed an instalment-bond payable at yearly instalments of R1,000 with interest at 6 per cent. on overdue instalment. The hundi for R600 was dishonoured in 1895 and the firm sued the defendant for its amount, plus R45 interest in Suit No. 249 of 1895. The defendant pleaded want of consideration for the hundi, and further said that the acknowledgment had been passed in ignorance of the true state of accounts and because the facts had been concealed and misrepresented. A Commissioner was appointed to examine the plaintiff's account. He reported that the debt really due on the 4th June, 1893, was R3,016-3-0 and not R11,534-15-0 as stated in the Ruzu. Upon this the claim in the suit was decreed without an adjudication of other questions raised by the defendant. In 1897, the firm sued the defendant for the first and second instalments, which had become due under the instalment-bond. This was Suit No. 105 of 1897 and was for R2,000 and interest. The defendant admitted the claim, which was decreed accordingly by consent. In 1898, the defendant instituted Suit No. 412 of 1898 against the Bakhatram firm for cancellation of the instalment-bond alleging that it was obtained by misrepresentation and fraud, and was void in law having been passed in respect of wagering transactions and that nothing was due under it. The final decision in the case was passed by the High Court, who, without giving any decision on the merits, dismissed the suit as time-barred. Pending the above proceedings, the plaintiff filed this suit in 1902 against the defendant on the instalment-bond to recover the 3rd, 4th and 5th instalments amounting in all to R3,000 and interest. The defendant pleaded *inter alia* that the instalment-bond and prior Ruzu were obtained from him by fraud and misrepresentation and that the debt due was one arising from wagering contracts unenforceable by law. No findings were recorded on these points, as the Subordinate Judge held that the defendant was precluded by the decrees in Suits Nos. 249 of 1895 and 105 of 1897 from raising any of these contentions. The claim was decreed with costs. On appeal, the District Judge also came to the conclusion that the bar of *res judicata* operated against the defendant, but held that the claim as to the 3rd and 4th instalments was barred by limitation. Both the parties preferred appeals to the High Court. *Held* by ASTON, *J.*—(1) that, unless it be established that the pleas, which the defendant had raised in the present suit and had not been allowed to prove, if proved in the Hundi Suit No. 249 of 1895, have reduced the amount actually due by him in June, 1893, to less than R600, plus the R400 paid in cash, the decision in the hundi suit could not operate, as *res judicata* in respect of the said pleas, for the matter which might and ought to be made a ground of defence in the hundi suit must be a ground of defence to "the claim actually made" in the said former suit, (2) that the plea that the

RES JUDICATA—*continued.*

consideration for the instalment-bond partly failed, because of the reasons set up in the pleas aforesaid, would have been irrelevant in the later Suit No. 195 of 1897 for the first two instalments of R1,000 due under that bond, unless by setting up these pleas and proving them the claim in that later suit for R2,000, the amount of the first two instalments, would have been reduced. *Held* by SCOTT, *J.*—(1) that before the present suit was brought the issue as to consideration had not been raised, except with reference to the hundi and had been heard and determined in Suit No. 249 of 1895 with reference to that document alone. The defendant was, therefore, not barred by *res judicata* from pleading in this suit that the bond was no longer supported by consideration. (2) that the lower Court was wrong in holding that the defendant was barred by s. 13 of the Civil Procedure Code (Act XIV of 1882) from raising the questions of fraud or wager as vitiating the bond as a security for the payment of the remaining instalments. The issue in Suit No. 249 of 1895 was a sufficient issue for the disposal of the case on the hundi and in that suit the defendant's liability under the hundi was the only matter in issue. In Suit No. 105 of 1897 there was no hearing and disposal of any matter in issue and the provisions of s. 13 had, therefore, no application. Regard must be had to the reason and scope of the consent decree. A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may have himself brought an unsuccessful suit to set aside the transaction, and is not under certain circumstances like those in hand precluded from urging that plea by lapse of time. *Rangnath* v. *Govind, I. L. R. 28 Bom. 639*, followed, *Mahomed* v. *Ezekiel, 7 Bom. L. R. 772*, not followed. MINALAL SHADIRAM *v.* KHARSETJI (1906).

I. L. R. 30 Bom. 395

——— *Gujrát Talukdar's Act (Bombay Act VI of 1888), ss. 10, 11, 16 and 17—Talukdari Settlement Officer—Decision—Appeal—Second appeal—Subsequent suit in a Court of competent jurisdiction.*—Certain proceedings, which had arisen out of an application to the Talukdari Settlement Officer under s. 11 of the Gujrát Talukdar's Act (Bombay Act VI of 1888) went up to the High Court in second appeal. Subsequently the same question having arisen between the same parties in a regular suit in a Court of competent jurisdiction,—*Held*, that the question was not *res judicata*. A Talukdari Settlement Officer is not a Court of jurisdiction competent to try the suit. He is an administrative officer according to the machinery prescribed by the Bombay Legislature. "In considering the competency of a Court for the purpose of deciding on a question of *res judicata*," the Court "must look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal." *Toponidhee Dhiraj Gir Gosain* v. *Sreeputty Sahanee, I. L. R. 5 Calc. 832, 838*, followed. MALUBHAI *v.* SURSANGJI (1905).

I. L. R. 30 Bom. 220

RES JUDICATA—*continued.*

——— *Res judicata*—To support a plea of *res judicata* it must appear from inspection of the record that the person whose interest it is sought to bind was in some way a party to the suit. A mortgagor of an undivided share may redeem the entirety, if the mortgagee does not object and may be compelled to do so, if required by the mortgagee. Therefore the fact that a suit for redemption of the entire property instituted by such a person was dismissed cannot affect the right of a co-sharer, who was not a party to that suit. In a suit for redemption it was ordered that the mortgagor should recover possession on depositing the mortgage money in the Government Treasury. The money was deposited, but before it could be made over to the mortgagee, the Sepoy Mutiny broke out and the Treasury was looted: *Held*, that the decree having become incapable of execution owing to *vis major*, a fresh suit for redemption was required to give effect to the rights of the parties and do justice between them; and such a suit was not barred under s. 244 of the Civil Procedure Code. CHAUDHURI AHMED BAKSH *v.* SETH RAGHUBER DYAL (1905) . **10 C. W. N. 115**

——— *Res judicata in rent suits—Incidental or collateral issues—Adjudication upon title to the land in rent suits, when res judicata in a subsequent title suit.*—Where in a suit for rent the defendant denies the relationship of landlord and tenant and either sets up the title of a third person to the land for which rent is claimed, or pleads that she is not in occupation of the land or that the tenancy which existed has expired, the only material issue to be decided in the suit is whether the relationship of landlord and tenant subsisted between the parties for the period covered by the suit and the issue, if any, raised as to the title to the land is an incidental or collateral issue not necessary for the decision of the suit: therefore the adjudication on this latter issue cannot operate as *res judicata* in a subsequent suit between the parties for the establishment of title to the land. *Srihari Bansrjee* v. *Khitish Chandra Roy Bahadur, I. L. R. 24 Calc. 569, Run Bahadur* v. *Lucho Koer, I. L. R. 11 Calc. (P. C.) 301*, and *Dwarka Nath Roy* v. *Ram Chand Aich, 3 C. W. N. 266: s.c. I. L. R. 26 Calc. (F. B.) 428*, referred to. But where in a rent suit, the alleged tenant denies the plaintiff's title to the land and sets up his own title to the same, the issue as to the title to the land becomes a substantial issue in the suit, and the decision of the Court on the question of title becomes *res judicata* in a subsequent suit between the parties for establishment of title to the land. *Raj Krishen Mukerjee* v. *Radhamadhab Haldar, 21 W. R. 349, Radhamadhab Haldar* v. *Monohur Mukerjee, I. L. R. 15 Calc. 756*, and *Kasiswar Mukhopadhya* v. *Mohendra Nath Bhandari, I. L. R. 25 Calc. 136*, referred to. Where in a suit brought by the plaintiff against the defendant for rent in respect of an alleged *jama* of R7 the defendant pleaded that he did not hold any separate *jama* of R7 under the plaintiff, but that the lands covered by the suit were included in a *jama* of R33 and odd, which they held under the plaintiff, and the Court held that the defendant did not hold

RES JUDICATA—*continued.*

any separate *jama* of R7 under the plaintiff and the lands of the alleged *jama* were included in the defendant's *jama* of R33 odd: *Held*, that the decision that the lands were included within the defendant's *jama* of R33 odd, was not necessary for the decision of the suit, and consequently could not be *res judicata* in a subsequent suit brought by the plaintiff against the defendant for the declaration of his title to those lands and for *khas* possession thereof. SAHADEB DHALI *v.* RAM RUDRA HALDAR (1906) . . . . **10 C. W. N. 820**

——— *Res judicata—Suit.*—Where after a remand by a higher Court, an issue was raised and accepted by the parties, and the decision became final owing to the abandonment of an appeal. *Quære*—Whether the decision was *res judicata* in a subsequent suit notwithstanding that the raising of the issue on remand in the previous suit might have been open to objection. TIRBHUWAN BAHADUR SINGH *v.* RAMESWAR BAKSH SINGH (1906).
10 C. W. N. 1065
s.c. L. R. 33 I. A. 156
I. L. R. 28 All. 727

——— *Res judicata—Suit dismissed in defendant's absence on plaintiff's failure to adduce evidence—Fresh suit, if barred.*—S. 13 of the Civil Procedure Code is no bar to a fresh suit, when the previous suit was dismissed in the defendant's absence on the failure of the plaintiff to adduce evidence. *Radha Prosad Singh* v. *Lál Sahab Rai I. L. R. 13 All. 53*, referred to. DOMA RAM *v.* RAGHU NATH PANDIT (1905) . **10 C. W. N. 40**

——— *Decision in previous suit that an agreement barred plaintiff's right—Such decision res judicata though agreement time barred at date of subsequent suit.*—A decision in a previous suit for possession of property, that an agreement to sell executed by the owner of such property in favour of the defendant and a tender of performance by the defendant, disentitled the plaintiff (who was found to have purchased with knowledge of the agreement and tender) to possession, will operate as *res judicata* in a subsequent suit between the same parties on the cause of action. The fact that at the time the subsequent suit was instituted such contract of sale had become unenforcible by the Law of Limitation will not prevent the operation of the bar, when it is clear from the judgment in the previous suit that the Court did not intend that the defendant should bring a suit for specific performance of the contract. ADAKKALAM CHETTIYAR *v.* RAMALINGA CHETTIAR (1906) . . **I. L. R. 29 Mad. 320**

——— *Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Suit instituted before Munsif—Compromise-decree on appeal before District Judge—Application for review to have compromise-decree set aside—Decision, if bars fresh suit before Subordinate Judge—Ground for setting aside compromise-decree not raised in review—Fresh suit on such ground, if lies—Procedure for setting aside decree—Rule issued by the High Court—Discharge—Effect.*—Plaintiffs had instituted

RES JUDICATA—*continued.*

three suits against the defendants in the Court of the Munsif. Pending appeals preferred before the District Judge against the decrees of the Munsif, a compromise was filed and decrees made thereon. The plaintiffs then applied for review of the decrees alleging that their pleader had no authority to agree to the compromise. The District Judge rejected the application on the ground that the pleader had the requisite authority. The plaintiffs obtained rules from the High Court against this order, but they were discharged. Plaintiffs now instituted a fresh suit in the Court of the Subordinate Judge praying that the compromise and the decree made thereon be set aside on the ground that the pleader had no authority to compromise and that the terms of the compromise went outside the subject-matter of the suit. *Held*, that in order to have the compromise-decree set aside it was open to the plaintiffs to proceed either by way of suit or by an application for review, the latter being the more regular mode of procedure. *Ashutosh Chandra* v. *Tara Prosanna Roy, I. L. R. 10 Calc. 612 (1884)*, followed. That the effect of the discharge of the rules issued by the High Court was to leave the order of the District Judge undisturbed. That the question regarding the pleader's authority to compromise was directly and substantially in issue in the proceeding for review and was heard and finally decided by the Court of the District Judge which was a Court of jurisdiction competent to try the present suit. The suit in consequence is barred by the rules of *res judicata*. *Koylash Chandra De* v. *Tarack Nath Mandal, I. L. R. 25 Calc. 571*; *Bhagwanbuttee Chowdhurain* v. *A. H. Forbes, I. L. R. 28 Calc. 78*, relied on. An independent suit would not lie merely because a ground is alleged for setting aside the decree, which was not taken in the application for review. The plaintiffs having elected to proceed by way of review, ought to have raised upon their application all the grounds upon which they relied for setting aside the decree. RAM GOPAL MAZUMDAR *v.* PRASUNNA KUMAR SANIAL (1905).
10 C. W. N. 529

RESERVATION.

——— **Grant.**

See LANDLORD AND TENANT.
10 C. W. N. 425

RESPONDENTS.

See MESNE PROFITS.
I. L. 3 Calc. 329

RESTITUTION.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 244, 583.
I. L. R. 33 Calc. 857

RESTITUTION OF CONJUGAL RIGHTS.

See MAHOMEDAN LAW.
I. L. R. 30 Bom. 122

RESUMPTION.

See CANTONMENT PROPERTY.
I. L. R. 30 Bom. 137

See SERVICE TENURE. 10 C. W. N. 161

RE-UNION.

See HINDU LAW . 10 C. W. N. 236

REVENUE.

See RENT . I. L. R. 33 Calc. 140

REVENUE COURTS, JURISDICTION OF.

See PUBLIC DEMANDS RECOVERY ACT (BENGAL ACT VII OF 1880), SS. 2, 17, 24.
I. L. R. 33 Calc. 1178

REVENUE SALE.

See CHOWKIDARI CHAKRAN ACT.
10 C. W. N. 598

REVENUE SALE LAW (ACT XI OF 1859).

See SALE FOR ARREARS OF REVENUE.

REVERSIONER.

See HINDU LAW.
I. L. R. 33 Calc. 241

See PROBATE . I. L. R. 33 Calc. 1001

REVIEW.

See CIVIL PROCEDURE CODE.
I. L. R. 33 Calc. 240, 605

———*Second Appeal.*—Application for review granted and the case directed to be restored to the file and re-heard. RAJ NARAIN DAS *v.* SHAMANANDA DAS CHOWDHRY (1900).
I. L. R. 33 Calc. 1362

———*Civil Procedure Code (Act XIV of 1882), ss. 551, 623—Decree passed by first Court allowing plaintiff's claim—Appeal by defendant—Summary dismissal of appeal—Application by defendant to the first Court for review—Jurisdiction.*—Plaintiff having obtained a decree in the first Court, the defendant appealed, but his appeal was summarily dismissed under s. 551 of the Civil Procedure Code (Act XIV of 1882). Subsequently the defendant applied to the first Court for review of judgment under s. 623 of the Code on the ground of discovery of new and important evidence. *Held*, that as the defendant had preferred an appeal and it was dismissed under s. 551 of the Code, his application to the first Court of review of judgment could not be entertained. It is open to the person aggrieved, after an appeal has been preferred, to apply for a review, provided his appeal is withdrawn. As by the cancellation of the order for admission of an appeal it is to be taken that no appeal was admitted,

REVIEW—*concluded.*

so by withdrawal of the appeal it must be treated as though no appeal was preferred. But when an appeal is actually dismissed, it was in fact preferred and cannot be regarded as not having been preferred. RAMAPPA *v.* BHARMA (1906).
I. L. R. 30 Bom. 625

———*Civil Procedure Code (Act XIV of 1882), ss. 623 and 626—Order in execution—Decree—Order rejecting application for review—Appeal.*—An order in execution, being a decree under the Civil Procedure Code (Act XIV of 1882), was passed on the 20th November, 1902, and a supplementary order as to costs was made on the 20th December following. On the 3rd August, 1903, the party aggrieved by the latter order applied under s. 623 of the Civil Procedure Code for a review of judgment. Notice was issued to the opposite party and the application for review was heard with the result that the Judge after disposing of certain technical objections proceeded to deal with the case on the merits and having done so he rejected the application for review with costs on the 14th September, 1903. Against the said order the applicant having appealed,—*Held* that the order rejecting the application for review was not appealable. The proper procedure would be to appeal from the order of the 20th December, 1902, relating to costs. A petition of review involves three stages of procedure. The first stage commences ordinarily with an *ex parte* application under s. 623 of the Civil Procedure Code. The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached. The case is re-heard on the merits and may result in a repetition of the former decree or some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repealed, in law there is a material difference, for in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest, on the old decree. VADILAL *v.* FULCHAND (1906) . . . . I. L. R. 30 Bom. 421

———*Review of judgment—Effect of order on review—Appeal from original decree.*—Where an application for review of judgment is granted, the result is a new decree superseding the original decree, and not merely some amendment thereof. An appeal was filed pending an application for review of judgment in the Court below; the review was granted, and an order passed which purported merely to amend the decree then under appeal. *Held*, that the order for review superseded the original decree; the decree under appeal had ceased to exist and the appeal could not be heard. *Kuar Sen* v. *Ganga Ram, Weekly Notes, 1890, p. 144*, followed. KANHAIYA LAL *v.* BALDEO PRASAD (1905) . . . I. L. R. 28 All. 240

REVISION.

See AWARD.

See CIVIL PROCEDURE CODE.
I. L. R. 33 Calc. 84

See CRIMINAL PROCEDURE CODE.
I. L. R. 33 Calc. 554

See POSSESSION.

RIGHT OF OCCUPANCY.

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 531

——— *Acquisition of right of occupancy—Contract, effect of—Contract barring acquisition of right in perpetuity—Bengal Act VIII of 1869, s. 7—Bengal Tenancy Act (VIII of 1885), ss. 178 (1), cl. (a—s.), 178 (3), cl. (a).*—An agreement made before the passing of the Bengal Tenancy Act between a landlord and his tenant, which bars the acquisition of the right of occupancy during the lifetime of the tenant, does not come within the prohibitory terms of s. 178 (3), cl. (*a*) of the Act, nor does it come within the terms of s. 178(1), cl. (*a*) of that Act. Where before the passing of the Bengal Tenancy Act a landlord entered into an agreement with his tenant and the defendant that the former would hold certain lands under him for her life and that after her death the landlord would take *khas* possession of them and that her heirs, that is, the defendant or her heirs, would never raise any objection or prefer any sort of claim to them. *Held*, that it was a valid contract under s. 7, Bengal Act VIII of 1869 : that the tenant during her lifetime was not an occupancy raiyat and that the defendant, never having been recognized by the landlord as tenant, was a trespasser. BAUL CHANDRA CHAKRAVARTI *v.* NISTARINI DEBI (1905).
I. L. R. 33 Calc. 136
s.c. 10 C. W. N. 533

——— *Acquisition of right of occupancy—Ghatwali tenures—Bengal Tenancy Act (VIII of 1885), s. 181.*—Occupancy rights cannot be acquired in ghatwali lands. *Mohesh Majhi* v. *Pran Krishna Mondal, 1 C. L J. 1348*, referred to. UPENDRA NATH HAZRA *v.* RAM NATH CHOWDHRY (1906) . . . I. L. R. 33 Calc. 630

RIGHT OF REPLY.

See CRIMINAL PROCEDURE CODE.
I. L. R. 30 Bom. 421

RIGHT OF SUIT.

See BENGAL TENANCY ACT, s. 188.
10 C. W. N. 787

See BOND, ALTERATION OF.

See CIVIL PROCEDURE CODE, s. 13.
10 C. W. N. 115

See CIVIL PROCEDURE CODE, s. 311.
10 C. W. N. 274, 505, 866

RIGHT OF SUIT—*continued.*

See PUBLIC DEMANDS RECOVERY ACT, s. 7.
10 C. W. N. 130

——— *Mistake in decree—Separate suit to set aside—Maintainability.*—It cannot be broadly laid down that any error in a decree made by a Court may be challenged by a separate suit. *Sadho Misser* v. *Golab Singh, 3 C. W. N. 375 ; Jogeswar Atha* v. *Ganga Bishnu Ghattack, 8 C. W. N. 473 (1903)*, referred to. CHAND MEA *v* ASIMA BANU (1906) . . . . 10 C. W. N. 1024

——— *Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Suit instituted before Munsif—Compromise-decree on appeal before District Judge—Application for review to have compromise-decree set aside—Decision, if bars fresh suit before Subordinate Judge—Ground for setting aside compromise-decree not raised in review—Fresh suit on such ground, if lies—Procedure for setting aside decree—Rule issued by the High Court—Discharge—Effect.*—Plaintiffs had instituted three suits against the defendants in the Court of the Munsif. Pending appeals preferred before the District Judge against the decree of the Munsif, a compromise was filed and decrees made thereon. The plaintiffs then applied for review of the decrees alleging that their pleader had no authority to agree to the compromise. The District Judge rejected the application on the ground that the pleader had the requisite authority. The plaintiffs obtained rules from the High Court against this order, but they were discharged. Plaintiffs now instituted a fresh suit in the Court of the Subordinate Judge praying that the compromise and the decree made thereon be set aside on the ground that the pleader had no authority to compromise and that the terms of the compromise went outside the subject-matter of the suit. *Held*, that in order to have the compromise-decree set aside it was open to the plaintiffs to proceed either by way of suit or by an application for review, the latter being the more regular mode of procedure. *Ashootosh Chandra* v. *Tara Prasanna Roy, I. L. R. 10 Calc. 612 (1884)*, followed. That the effect of the discharge of the rules issued by the High Court was to leave the order of the District Judge undisturbed. That the question regarding the pleader's authority to compromise was directly and substantially in issue in the proceeding for review and was heard and finally decided by the Court of the District Judge, which was a Court of jurisdiction competent to try the present suit. The suit in consequence is barred by the rules of *res judicata*. *Koylash Chandra De* v. *Tarack Nath Mandal, I. L. R. 25 Calc. 571 ; Bhagwanbuttee Chowdhurain* v. *A. H. Forbes, I. L. R. 28 Calc. 78*, relied on. An independent suit would not lie merely because a ground is alleged for setting aside the decree, which was not taken in the application for review. The plaintiffs having elected to proceed by way of review, ought to have raised upon their application all the grounds upon which they relied for setting aside the decree. RAM GOPAL MAZUMDAR *v.* PRASUNNA KUMAR SANIAL (1905).
10 C. W. N. 529

RIGHT OF SUIT—*concluded.*

——— *Agreement in subsequent deed to pay balance due on a prior document, gives no fresh right of suit, when previous obligation not discharged.*—Where a promissory note had been executed by the defendant in favour of the plaintiff and some time afterwards the defendant by another document assigned certain decrees to the plaintiff and the document provided that the amounts realized by executing the decrees should be credited towards the amount due on the promissory note and that the defendant should pay any balance that may remain due after the decrees had been realized, but the original promissory note had not been cancelled or returned to the defendant or otherwise discharged:—*Held*, that the plaintiff's only claim was on the promissory note and that the subsequent document conferred no fresh right of suit and that the plaintiff's suit brought after the expiry of the period of limitation for a suit on the promissory note was barred. *Barker's claim (1894), 3 Ch. D. 290*, referred to and applied. VENKATARAMIAH PANTULU *v.* RAMAKRISHNA PANTULU (1906).
I. L. R. 29 Mad. 295

RIOTING.

See CRIMINAL PROCEDURE CODE.

——— *Common object, omission to find—Failure of the common object charged—Appellate Court—Defective charge—Prejudice—Criminal Procedure Code (Act V of 1898), ss. 423, 537, sc. (a)—Private defence of property in possession of assailants—Penal Code (Act XLV of 1860), s. 97, 99, 147.*—*Held*, by WOODROFFE and MOOKERJEE, *JJ.* (RAMPINI, *J.*, *dissenting*) that, when the judgments of the Appellate Court and the Magistrate contain no finding as to what the common object of an unlawful assembly, if any, was, the conviction ought to be set aside. Where the common object stated in the charge against the petitioners was to take possession of some property by criminal force or to enforce a right or supposed right on it, and the Appellate Court found that the opposite party had been trying to encroach upon the land decreed to the petitioners and that the occurrence was the result of the complication, which the opposite party was trying to introduce by stealthy, wrongful acts:—*Held*, by the majority of the Court, that the common object alleged in the charge had not been made out, and that the accused were entitled to be acquitted. *Rahimmuddi* v. *Asgar Ali, I. L. R. 27 Calc. 990* followed. Where the charge did not specify the property, the taking possession of which was stated to be the common object of the unlawful assembly, and its specification would have altered the whole complexion of the case:—*Held*, by the majority of the Court, that the omission had prejudiced the accused and was not cured by s. 537, cl. (*a*): *Behari Mahton* v. *Queen-Empress, I. L. R. 11 Calc. 106. Sabir* v. *Queen-Empress, I. L. R. 22 Calc. 276*, and *Chunder Coomar Sen* v. *Queen-Empress, 3 C. W. N. 605*, followed. Where the petitioners were maintained in possession of certain lands, under s. 145 of the Criminal Procedure Code, including the homestead of *A*, and the opposite party unlawfully attempted to take possession of some huts standing thereon, whereupon the petitioners came with an armed body and demolished the huts, and on being resisted by the opposite party wounded some of them:—*Held*, by the majority of the Court, that they were justified in taking precautions and using such force as was necessary to prevent aggression by the opposite party. *Pachkouri* v. *Queen-Empress, I. L. R. 24 Calc. 686*, followed. *Ganouri Lal Das* v. *Queen-Empress, I. L. R. 16 Calc. 206*, distinguished. PORESH NATH SIRKAR *v.* EMPEROR (1905) . . . . **I. L. R. 33 Calc. 295**

RIOTING—*concluded.*

ROAD AND PUBLIC WORKS CESSES.

See ABWABS . **I. L. R. 33 Calc. 683**

ROAD-CESS.

See SALE . . **10 C. W. N. 969**

RULE AGAINST PERPETUITY.

See WILL . **I. L. R. 29 Mad. 477**

S

SALE.

See BENAMI . . **10 C. W. N. 570**

See BENGAL TENANCY ACT. **10 C. W. N. 976**

See CERTIFICATE . **I. L. R. 33 Calc. 84**

See CIVIL PROCEDURE CODE. **10 C. W. N. 193** **I. L. R. 30 Bom. 575**

See GUARDIAN . . **10 C. W. N. 763**

See LANDLORD AND TENANT. **I. L. R. 33 Calc. 566**

See MORTGAGE . **I. L. R. 33 Calc. 92, 689**

See POSSESSION . **I. L. R. 33 Calc. 487**

See PUBLIC DEMANDS RECOVERY ACT. **I. L. R. 33 Calc. 1178** **10 C. W. N. 130**

See REVENUE SALE LAW. **10 C. W. N. 137, 497**

See TRANSFER OF PROPERTY ACT, S. 90. **10 C. W. N. 862**

——— *Decree—Setting aside sale—Void sale—Code of Civil Procedure (Act XIV of 1882), s. 244—Mortgage—Sale of mortgaged property—Money decree—Transfer of Property Act (IV of 1882), ss. 67, 99.*—A sale in contravention of the provisions of s. 99 of the Transfer of Property Act is void, although a third party is the purchaser and only a portion of the property was under mortgage

SALE—*continued.*

the sale being of the whole undivided property. *Sheodeni Tewari* v. *Ram Saran Singh, I. L. R. 26 Calc. 164*, and *Shib Dass Dass* v. *Kali Kumar Roy, I. L. R. 30 Calc. 463*, referred to. Such a sale may be set aside under s. 244 of the Code of Civil Procedure. *Mayan Pathuti* v. *Pakuran, I. L. R. 22 Mad. 347*, followed. SONU SINGH v. BEHARI SINGH (1905) . . **I. L. R. 33 Calc. 283**

——— *Public Demands Recovery Act (Bengal Act I of 1895), ss. 20, 21—Civil Procedure Code (Act XIV of 1882), ss. 223, 224, 244, 311, 312—Setting aside sale—Irregularity—Right of suit.*—A certificate for recovery of cesses was made by the Cess Collector of Burdwan against the plaintiff and other persons, who were all residents of that district; the major portion of the property in respect of which the certificate was made was also situated within the jurisdiction of the Burdwan district; the certificate was, however, ordered to be sent to Birbhum for execution and an intimation was sent that the demand was to be realised by the sale of the debtors' interest in a certain *mouzah* in Birbhum. The Birbhum Court thereupon held the sale. *Held*, in a suit to set aside the sale, that the sending of the certificate for execution to the Birbhum Court was not authorised under s. 223 of the Civil Procedure Code, and consequently the subsequent proceedings were not legal and the sale cannot stand. That the suit was not barred by s. 312 of the Civil Procedure Code. S. 312 of the Civil Procedure Code does not apply to execution proceedings held under the Public Demands Recovery Act. *Ram Taruck Hazra* v. *Dilwar Ali, I. L. R. 29 Calc. 73*, relied on. GIRISH CHANDRA CHANGDAR v. GOLAM KARIM (1906) . . . **10 C. W. N. 347**
s.c. I. L. R. 33 Calc. 451

——— *Public Demands Recovery Act (Bengal Act VII of 1880), s. 17—Powers of revision of the Commissioner and the Board of Revenue—Certificate sale—Setting aside—Certificate issued under the Cess Act (Bengal Act IX of 1880)—Limitation—Deciding case in a party's absence—Proper remedy.*—Bengal Act VII of 1880 for the recovery of public demands applied to cases of road and other cesses. *Sadhusaran Singh* v. *Panchdeo Lal, I. L. R. 14 Calc. 1*, referred to. Where a Commissioner set aside a sale held in execution of a certificate granted by a Deputy Collector in respect of a fine imposed for failure to comply with a notice under s. 16 of the Cess Act, on the ground that the evidence for the petitioner made out "a *prima facie* case of fraud, or at any rate of irregularities, which prevented the petitioner from obtaining knowledge of the proceedings against him, and caused the sale of his estate at a most inadequate price," *Held*, that the power of revision conferred on the Commissioner by s. 17 of Bengal Act VII of 1880, was amply sufficient to justify the order setting aside the sale. The Board of Revenue also had power to interfere in this case under s. 24 of the Act. S. 17 of Bengal Act VII of 1880 applied to orders made after as well as before sales in execution of certificates issued under the Act. The periods of limitation applicable in ordinary cases were not binding on the Commissioner, when he was acting in exercise of his revisional jurisdiction. It is an elementary principle, which is binding on all persons, who exercise judicial or *quasi* judicial powers, that an order should not be made against a man's interest without there being given him an opportunity of being heard. In this case the order of the Commissioner annulling the sale was challenged in a regular suit brought in the Civil Court on the ground that the order was made without hearing the purchaser. *Held*, that the proper remedy of the purchaser was to apply to the Commissioner for a re-hearing. LALITESWAR SINGH v. MOHUNT RAM KISHEN DAS (1906).
10 C. W. N. 969

——— *Application to set aside sale on the ground of fraud—Previous suit with similar object dismissed—Procedure—Estoppel.*—S. 144 (*c*) of the Civil Procedure Code governs a case in which a person seeks to set aside an auction sale on the ground of fraud and on the ground that the decree-holder himself held a mortgage on the property brought to sale. This plea had been urged successfully by the appellant in a regular suit brought by the present respondent, but the former now pleaded that the remedy should be by suit and not by execution proceedings. *Per* AIKMAN, *J.*—The appellant cannot be allowed to go behind the issue decided in the course of the previous litigation. GAYA PRASAD MISR v. RANDHIR SINGH (1906).
I. L. R. 28 All. 681

——— *Transfer of Property Act (IV of 1882), s. 90—Execution of decree—Payment into Court of decretal money and costs—Stay of sale.*—Where the sale of mortgaged property has been directed by an order absolute under s. 8 of the Transfer of Property Act, 1882, it is open to the person holding the equity of redemption in such property to pay into Court at any time before the sale the amount of the decretal debt and costs, and thereupon the execution proceedings will cease. It is not necessary that the person holding the equity of redemption should wait, until the property is actually put up for sale. *Raja Ram Singhji* v. *Chunni Lal, I. L. R. 19 All. 205*, and *Harjas Rai* v. *Rameshar, I. L. R. 20 All. 354*, followed. *Bibijan Bibi* v. *Sachi Bewah, I. L. R. 31 Calc. 863*, referred to. MISRI LAL v. MITHU LAL (1905).
I. L. R. 28 All. 28

——— *Execution of decree—Sale in execution—Non-payment of required portion of the purchase money at date of sale—Irregularity.*—*Held*, that the fact that an auction purchaser at a sale held in execution of a decree did not pay the 2 per cent. of the purchase-money required by s. 306 of the Code of Civil Procedure at the time of the sale was a mere irregularity, which would not affect the validity of the sale, unless it could be shown that substantial injury was thereby caused to the judgment-debtor. *Intizam Ali Khan* v. *Narain Singh, I. L. R. 5 All. 316*, declared to be no longer law. AHMAD BAKHSH v. LALTA PRASAD (1905) . . . **I. L. R. 28 All. 238**

——— *Execution of decree—Application to set aside sale—Who have a right to apply—*

SALE—*concluded.*

Revision.—A mortgagee sued for sale on his mortgage impleading, besides the mortgagee, two persons, who claimed a title to the mortgaged property adverse to the mortgagee. In that suit it was decided that the property the subject of the mortgage in suit belonged to the mortgagor and not to the other defendants. The plaintiff mortgagee obtained a decree for sale and caused the mortgaged property to be sold by auction. The defendants, other than the mortgagor, applied to have this sale set aside under s. 310A. of the Code of Civil Procedure, but their application was rejected and they then sought in revision to get this order reversed. *Held* by BANERJI, *J.*—That the defendants applicants were not entitled to make an application under s. 310A of the Code, they not being judgment-debtors, whose property had been sold. *Per* RICHARDS, *J.*—Whether or not applicants were entitled to make the application, which they did make (and they possibly were so entitled) the Court below did not fail to exercise a jurisdiction vested in it by law nor did it act in the exercise of that jurisdiction illegally. Its order was, therefore, not open to revision. *Rajah Amir Hasan Khan* v. *Sheo Baksh Singh*, *L. R. 11 I. A. 237*, referred to. RAM SINGH *v.* SALIG RAM (1905).

I. L. R. 28 All. 84

——— *Execution of decree—Property to be sold ancestral in part only—Transfer of decree to Collector—Notification (Local Government) No. 671, dated August 31st, 1850.—Held*, that where the Civil Court is satisfied that the land, which is ordered to be sold or any portion of it is ancestral, it should transfer the decree for execution to the Collector so far as regards ancestral land only. AHMAD GHAUS KHAN *v.* LALTA PRASAD (1906).

I. L. R. 28 All. 631

——— *Sale, setting aside—Irregularity—Jurisdiction.*—When a Court, in which an application for execution was pending, received an order from another Court under s. 273 of the Civil Procedure Code for attaching the decree and returned the order with an intimation that it did not contain information as to the amount of the decree and subsequently held the sale. *Held*, that the sale was invalid and was accordingly set aside. That it was not a mere irregularity as the Court had no jurisdiction to hold the sale. MANIK LAL SEAL *v.* BONOMALI MUKERJEE (1905). . 10 C. W. N. 193

SALE BY OFFICIAL ASSIGNEE.

See INSOLVENCY ACT.

I. L. R. 30 Bom. 515

SALE-DEED.

See CONSTRUCTION OF DOCUMENT.

I. L. R. 33 Calc. 44

SALE FOR ARREARS OF RENT.

——— *Rights of purchaser—Landlord having a mortgage of the holding—Transfer of Property Act (IV of 1982), s. 99.*—The sale of a holding in execution of a decree for rent obtained by a landlord, who also held a mortgage of the holding, is void, and the purchaser at the sale acquires no title against another mortgagee of the holding, who has purchased it under a decree on his mortgage. *Sheodeni Tewari* v. *Ram Saran Singh*, *I. L. R. 26 Calc. 164*, followed. BASIRUDDIN *v.* KAILAS KAMINI DEBI (1905) . I. L. R. 33 Calc. 113

SALE FOR ARREARS OF REVENUE.

——— *Revenue Sale Law (Act XI of 1859), ss. 28, 30—Liability of an auction-purchaser to pay arrears of Government revenue—Date of sale—Contract Act (IX of 1872), s. 59.*—The liability of an auction-purchaser at the sale held under Act XI of 1859 to pay arrears of Government revenue arises from the date of the sale, when the title vests in the purchaser and not from the date of the sale certificate. Laws regulating the relations of an ordinary creditor and debtor do not apply to the realization of land revenue. Where therefore a proprietor of an estate makes a payment expressly for a later period, when there were earlier arrears, the Collector was fully competent to set off the amount paid against the earliest arrears due. GANGA BISHUN SINGH *v.* MAHOMED JAN (1906).

I. L. R. 33 Calc. 1193
s.c. 10 C. W. N. 948

——— *Act XI of 1859, ss. 7, 18, 33—Collector's order exempting from sale—Conditional order, effect of—Notice of sale on raiyat—Irregularity in issue and service—Proof—Onus—Presumption—Bengal Act VII of 1868, s. 8—Evidence Act (I of 1872), s. 114 (e)—Substantial injury—Collector's grounds for exempting from sale—Court's power to examine.*—The plaintiff-respondents (proprietors of a mehal) defaulted to pay the June instalment of the revenue of 1898, namely, R22-9-2, the latest day of payment of which sum was the 28th June, 1898. On the 19th August, 1898, they remitted to the Collector by postal money order a sum of R30-1 on account of the revenue of the mehal without specifying for which instalment it was intended; but on the 3rd September following, they presented an application to the Collector praying that the amount remitted might be received on account of the June instalment and the mehal be released from liability to sale. The total amount of Government dues upon the estate at the time including revenue, cesses and other fees, being R46-8-6; the Collector on the 16th September, 1898, made the order ". . . Accept all dues, if paid within 3 days and exempt." Six days later the Collector further ordered "applicant has not appeared since, so payment not accepted." Before the passing of these two orders on the 12th September, 1898, the respondents had sent to the Collector by postal money order R30-1 anna for revenue of the mehal, without any specification as to instalment for which it was intended and this sum had been credited in the Collectorate books against the-

SALE FOR ARREARS OF REVENUE— *continued.*

September instalment of R30-1-4. The fact of this payment had not been brought to the notice of the Collector when he made his order of the 16th September, 1898. On the 22nd September, 1898, the estate was put up to auction and was purchased by the appellants for an inadequate price. *Held*, that as there was no order of exemption from sale within s. 18 of the Revenue Sale Law, the estate was liable to sale under its provisions. The conditional order made on the 16th September was not an order under s. 18 of the Act. *Per* MOOKERJEE, *J.*—It is not open to the plaintiff in a suit to set aside a revenue sale, to urge, under cover of a general ground taken in his appeal before the Commissioner, specific irregularities other than those urged before the Commissioner. *Bal Mukoond Lall* v. *Jirjudhun Ray, I. L. R. 9 Calc. 271,* commented on. It is not open to a Civil Court to examine the reasons of an order of a Collector purporting to be made under s. 18 of the Revenue Sale Law and to hold that the Collector ought to have made an order different from that made. The operation of s. 8 of Bengal Act VII of 1868, in curing defects in the issue and service of notices under s. 7 of the Revenue Sale Law considered. The onus is on the person, who seeks to have a sale set aside, to establish that the requirements of the statutes had not been complied with by the Collector. The fact that notice under s. 7 of the Act was not served in accordance with the provisions of that section does not necessarily lead to an inference of substantial injury to the proprietor. MOHAMMED AGA *v.* JADUNANDAN JHA (1905).
10 C. W. N. 137

——— *Act XI of 1859, s. 37—Assignee of an auction-purchaser of an entire estate, if entitled to avoid an encumbrance.*—An assignee of an auction-purchaser of an entire estate sold for arrears of revenue can exercise the privileges given to an auction-purchaser under the provisions of s. 37 of the Revenue Sale Law to avoid incumbrances. *Koilas Chandra Dutt* v. *Jabbar Ali, 20 W. R. 29 (1874),* followed. SOSHI BHUSAN MAJUMDAR *v.* KRAMATULLAH SHEIKH (1905) . . **10 C. W. N. 148**

——— *Act XI of 1859, s. 37—Suit for ejectment by purchaser—Occupancy raiyat—Defence—Onus—Bengal Tenancy Act (VIII of 1885), s. 21.*—A purchaser of an estate at a revenue sale sued an occupancy raiyat for the recovery of some lands, which were situate within the ambit of the estate. *Held*, that the onus is, in the first instance, on the raiyat to make out a *primâ facie* case, that at the time when the revenue sale took place and the plaintiff purchased the estate, he held the land in a suit as a raiyat within the meaning of the proviso in s. 37 of the Revenue Sale Law or within the meaning of s. 21 of the Bengal Tenancy Act. AMBIKA CHURN CHAKRAVARTI *v.* DYA GAZI (1906).
10 C. W. N. 497

——— *Act XI of 1859, s. 37—"Permanent Settlement," meaning of—Suit to avoid tenures—Burden of proof—Proof that tenure dates from the Permanent Settlement—Presumption backward.*—

SALE FOR ARREARS OF REVENUE— *concluded.*

Semble.—The expressions "permanently settled" and "permanent settlement" in s. 37 of the Revenue Sale Law contemplate the Permanent Settlement of 1793. *Koowar Singh* v. *Gom Sundar Persad Singh, I. L. R. 24 Calc. 887,* and *Raj Chunder Chowdhry* v. *Sheikh Bashir Mahomed, 24 W. R. 476,* referred to. In a suit to avoid certain tenures by a purchaser at a revenue sale of an estate, which was once permanently settled in 1793, purchased by Government at a sale under Act 1 of 1845 and again permanently settled in 1864, the plaintiff contended that these tenures were liable to be avoided, unless the defendants proved by positive evidence the existence of the tenures from the Permanent Settlement of 1793. The defendants proved that the tenures were mentioned in the Survey Chitta of 1839, that they were not avoided on purchase by Government and were again recognised by Government in 1864, that rents had been paid at a uniform rate for at least 60 years, and that there had been sales of the tenures. *Held*, that the Court may and ought to presume backwards and hold that the defendants have discharged the onus thrown on them by s. 37 of the Revenue Sale Law. *Upendra Krishna* v. *Ismail Khan, L. R. 31 I. A. 144* : *s.c. 8 C. W. N. 889,* followed. NAGENDRA LAL CHOWDHURY *v.* NAZIR ALI (1906) . . . **10 C. W. N. 503**

SALE PROCLAMATION.

See EXECUTION.
I. L. R. 33 Calc. 666

SANCTION OF COURT.

See INSOLVENCY ACT.
I. L. R. 30 Bom. 515

SANCTION TO PROSECUTE.

See CRIMINAL PROCEDURE CODE.
I. L. R. 33 Calc. 142, 554

——— *Registrar of the Small Cause Court—Judge—Validity of sanction—Power of the High Court on reference by Presidency Magistrate—Criminal Procedure Code (Act V of 1898), ss. 195 (1) cl. (b) ; 432, 433 (1) - Fraudulent decree not set aside by a Civil Court—Penal Code (Act XLV of 1860), s. 210.*—Where a plaintiff instituted a false suit for money, and fraudulently obtained an *ex parte* decree therein, before the Registrar of the Calcutta Small Cause Court, who subsequently left the country on furlough, and an application for sanction to prosecute him under ss. 209 and 210 of the Penal Code, in respect of such suit and decree was made to the Officiating Chief Judge of the Court, and granted by him :—*Held*, that the sanction was valid. Ordinarily, as a matter of convenience and expediency, an application for sanction should be made to the Judge, who tried the case, if he be present in the Court ; but if he is not, it is open to the Court, that is, to any other Judge of the Court to grant sanction. *In the matter of Krishna Gobinda Dutt, 9 C. W. N. 89,* distinguished and dissented

SANCTION TO PROSECUTE—*concluded.*

from. *Ambica Roy* v. *Emperor*, 2 *C. L. J. 65 n.*, referred to. *H. C. Pro. 12th November, 1872, 6 Mad. H. C. Ap. XII*, followed. Upon a Reference under s. 432 of the Criminal Procedure Code the High Court deals only with the particular points of law stated for its opinion, but not with the facts of the case nor any other objection to the validity of the proceedings referred. The offence in s. 120 of the Penal Code is committed, when the decree is fraudulently obtained, and the fact that the decree has not been set aside, though admissible to prove that there was no fraud, is not a bar to a prosecution under the section. EMPEROR v. MOLLA FUZLA KARIM (1905) . . **I. L. R. 33 Calc. 193**

SAPINDA.

See CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT, s. 144.
10 C. W. N. 284

See HINDU LAW.

SARANJAM.

See DEKKHAN AGRICULTURISTS' RELIEF ACT . . **I. L. R. 30 Bom. 101**

SAUDAYIK.

See HINDU LAW.

See STRIDHAN . **I. L. R. 30 Bom. 229**

SEBAIT.

See EVIDENCE ACT (I OF 1872), s. 90.
I. L. R. 33 Calc. 571

SECOND APPEAL.

See BENGAL TENANCY ACT, ss. 103A, 105, 106A, 109A . **I. L. R. 33 Calc. 832**

See CIVIL PROCEDURE CODE.
I. L. R. 30 Bom. 173

See PRE-EMPTION.
I. L. R. 33 Calc. 698

See REVIEW.

——— *Chutia Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879, as amended by Bengal Act V of 1903)—Order passed in execution.*—No second appeal lies from an order passed in execution under the Chutia Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879) as amended by Bengal Act V of 1903. ISWAR LAL SINGH v. JAGOO SAHU (1905).
I. L. R. 33 Calc. 378

——— *Question of law—Enhancement of rent—Bhaoli - Nakdi—Bengal Tenancy Act (VIII of 1885), s. 29—Evidence.*—Enhancement of rent under the Bengal Tenancy Act must mean an enhancement of the same kind of rent. A conversion of *nakdi* into *bhaoli* therefore cannot be regarded as an enhancement within the meaning of s. 29 of that Act. Where the Subordinate Judge left out of account an important portion of the evidence relied upon by the plaintiff, *Held*, that this was an error of law and a ground of second appeal to the High Court. HASSAN KULI KHAN v. NAKCHHEDI NONIA (1905) . . **I. L. R. 33 Calc. 200**

——— *Provincial Small Cause Court Act (IX of 1887), Sch. II, Art. 31—Jurisdiction of Small Cause Court—Suit to recover an ascertained sum as profits of land—High Court—Practice.*—The plaintiff sued to recover three specific sums of money amounting to R447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant. *Held*, that the suit was one cognizable by a Court of Small Causes; and that, therefore, no second appeal lay. GIRJABAI v. RAGHUNATH (1905).
I. L. R. 30 Bom. 147

——— *Suit of the nature cognizable in the Court of Small Causes—Execution of decree.*—No second appeal lies against an order in execution of a decree in a suit of the nature cognizable in the Court of Small Causes. *Shyama Charan Mitter* v. *Debendro Nath Mukerji, I. L. R. 27 Calc. 484*, followed. NARAYAN v. NAGINDAS (1905).
I. L. R. 30 Bom. 113

SECRETARY OF STATE, LIABILITY OF.

——— *Government servant, suit by—Power of the Government to dismiss its servants—Cause of action—Plaint.*—The Crown has power to dismiss its servants at will, and no authority representing the Crown is able in the employment of persons in the service of the Crown to contract with them so as to deprive the Crown of the enjoyment of that power. Such power can only be excluded and restricted by an Act of the Legislature. *Dunn* v. *The Queen, 1 Q. B. 116*, relied on. *Gould* v. *Stuart, App. Cas. 575*, distinguished. *Held*, that the plaint did not disclose a cause of action enforceable at law, because it did not allege that any statutory enactment existed, which had the effect of exempting the plaintiff from the liability, which the law imposed on those, who were engaged in the service of the Crown. VOSS v. SECRETARY OF STATE FOR INDIA (1906).
I. L. R. 33 Calc. 669

SECT.

See CIVIL PROCEDURE CODE.

SECURITY FOR GOOD BEHAVIOUR.

See CRIMINAL PROCEDURE CODE.

SERVICE TENURE.

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 339

——— *Grant of land for services—Grant in lieu of wages—Right of grantor to resume land when services are not required—Grant of mokhasah village for long period at unvarying quit-rent—Re-*

sumption, suit for.—Where a grant of land is subject to a burden of service, and is not a mere grant in lieu of wages the grantor has no right to put an end to the tenure, whether the services are performed or not, as long as the grantees are willing and able to perform the services. *Leelanund Singh* v. *Munoorunjun Singh, L. R. I. A. Sup. Vol. 181: 13 B. L. R. 124,* followed. A mokhasah village had been held by the defendants and their ancestors in a yearly quit-rent of R144 from a period antecedent to the introduction of the British Government on conditions of service to provide a specified number of men as custodians of the grantor's property and to attend him on hunting or military expeditions. The services were rendered intermittently and not continuously, and batta was paid to the grantees, when actually on duty. The quit-rent had never varied for a period of 120 years, and there had been no interference with a devolution of the property from heir to heir nor any instance of resumption during that period.—*Held,* in a suit for resumption by the zemindar, that he was not entitled to dispense with the services and resume the village at his option. VENKATA NARASIMHA APPA RAO v. SOBHANADRI APPA RAO (1905).

I. L. R. 29 Mad. 52
s.c. L. R. 23 I. A. 46
s.c. 10 C. W. N. 162

SET-OFF.

See CAUSE OF ACTION.

See PRE-EMPTION.

I. L. R. 33 Calc. 676

SHEBAIT.

See BENGAL TENANCY ACT. **10 C. W. N. 42**

See DEBUTTER . **10 C. W. N. 1000**

See HINDU LAW . **10 C. W. N. 825**

See LETTERS OF ADMINISTRATION. **10 C. W. N. 432**

See PROBATE AND ADMINISTRATION ACT, s. 3 . . **10 C. W. N. 322**

SHIAH.

See TRUSTEE.

SHIKMI INTEREST.

See MERGER . **I. L. R. 33 Calc. 1212**

SLANDER OF TITLE.

See CAUSE OF ACTION. **10 C. W. N. 107**

SMALL CAUSE COURT.

———— *Suit of the nature cognizable in the Court of Small Causes—Execution of decree—Second appeal.*—No second appeal lies against an order in execution of a decree in a suit of the nature cognizable in the Court of Small Causes. *Shyama Charan Mitter* v. *Debendra Nath Mukerjee, I. L. R. 27 Calc. 484,* followed. NARAYAN v. NAGINDAS (1905) . . . . **I. L. R. 30 Bom. 113**

SMALL CAUSE COURT, MOFUSSIL.

———— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Jurisdiction of Small Cause Court—Suit to recover an ascertained sum as profits of land—Second appeal—High Court—Practice.*—The plaintiff sued to recover three specific sums of money amounting to R447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant. *Held,* that the suit was one cognizable by a Court of Small Causes; and that, therefore, no second appeal lay. GIRJABAI v. RAGHUNATH (1905) . . . . **I. L. R. 30 Bom. 147**

———— *Jurisdiction—Suit for balance due on a partnership account—Addition of prayer for dissolution of partnership—Civil Procedure Code, s. 646B.*—Where a plaint asked in effect for the recovery of a balance alleged to have been struck on the winding up of a partnership. *Held,* that the fact that a prayer for a declaration that the partnership had been dissolved was added did not oust the jurisdiction of the Court of Small Causes. *Held,* also, that when a reference is made to the High Court under s. 646B of the Code of Civil Procedure, the Court, which makes it, should state its reasons for considering the opinion of the Subordinate Court, with respect to the nature of the suit to be erroneous. CHHOTU v. JAWAHIR (1905) **I. L. R. 28 All. 293**

———— *Application to set aside an ex parte decree—Necessity of depositing amount of decree or giving security.*—S. 17 of the Provincial Small Cause Courts Act, 1887, requires that at the time of presenting his application the applicant must either deposit in Court the amount of the decree or give security as provided for by the section so that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. *Jogi Ahir* v. *Bishen Dayal Singh, I. L. R. 18 Calc. 83,* followed. *Ramasami* v. *Kurisu, I. L. R. 13 Mad. 178,* and *Muhammad Fazal Ali* v. *Karim Khan, Punj. Rec. 1894, p. 410,* dissented from. JAGAN NATH v. CHET RAM (1906).

I. L. R. 28 All. 470

———— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Small Cause Court—Jurisdiction—Suit for contribution arising out of satisfaction of a joint decree for costs.—Held,* that a suit by one of several joint judgment-debtors, who had satisfied a joint decree for costs, for contribution against the other joint judgment-debtors, was not a suit exempted from the jurisdiction of a Court of Small Causes. *Biswa Nath Shah* v. *Naba Kumar Chowdhury, I. L. R. 15 Calc. 713,* followed. BHAIRON v. RAM BARAN (1905) **I. L. R. 28 All. 292**

———— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art 31—Suit for rent.*—A suit by a divided coparcener to recover his share of rent from a tenant, and, if he should not be liable, from the other coparcener in whose sole name the lease was executed by the tenant, is substantially a suit for rent and is not as against the coparcener "a

SMALL CAUSE COURT, MOFUSSIL— *concluded.*

suit for the profits of immoveable property belonging to plaintiff, which have been wrongfully received by defendant" within the meaning of Art. 31 of the second schedule of the Provincial Small Cause Courts Act. SRINIVASA RAGHAVA AYYANGAR *v.* PICHAIKARAN (1905) . . **I. L. R. 29 Mad. 184**

SOCIETIES REGISTRATION ACT (XXI OF 1860).

——— s. 20—*Charitable society—Religious society existing for the management of a public mosque.*—A religious purpose may be a charitable purpose, and a society for religious purposes will ordinarily be a society for charitable purposes. Charitable purposes are not restricted to the giving of alms or other charitable reliefs, but the words have a much wider legal meaning. *In re White : White v. White (1893), 2 Ch. D. 41,* followed. *Held,* that a religious society, which had for its object the control and management of, and the protection of the property appertaining to, a certain public mosque, was a society, which might legally be registered under the provisions of the Societies Registration Act, 1860. ANJUMAN ISLAMIA OF MUTTRA *v.* NASIR-UD-DIN (1906) . . . . **I. L. R. 28 All. 384**

SOLICITOR.

——— *Costs—Solicitor's lien for costs—Summary jurisdiction of Court over suitors—Compromise by parties without knowledge of solicitor—Solicitor's right to oppose motion—Negotiable security—Transfer of negotiable security by debtor to his creditor—Effect.*—By a private compromise between Cullianji, the plaintiff in the first suit, and Lakshmibai, the 6th defendant, who was also the plaintiff in the second suit, it was agreed that the plaintiff should give to Lakshmibai certain immoveable property and R15,853 in full settlement of her claim and a further sum of R500 for her solicitor's costs. On the 21st February, 1904, possession of the immoveable property was given and a sum of R500 paid to Lakshmibai. Cullianji also gave to her 3 hundis for R5,000, R5,000 and R5,853 respectively, but the hundis were dishonoured on their due dates. In March and April, 1904, the plaintiff paid 2 sums of R5,000 to Lakshmibai, by cheque, in lieu of the 2 hundis for R5,000. On the 4th June, 1904, Lakshmibai's solicitor gave notice to the plaintiff, that he had a lien for costs on the sum of R15,853 agreed to be paid by the plaintiff to his client. On the 22nd of June, 1904, the plaintiff paid the sum of R5,853 to Lakshmibai, in cash, in respect of the hundi for R5,853, which was dishonoured. The plaintiff, thereupon, moved for an order, authorizing the delivery to him of certain property, alleging that he had settled and satisfied the claims of Lakshmibai. Lakshmibai's solicitor opposed the motion on the ground that the settlement and satisfaction were collusive transactions intended to cheat him out of his costs and asked the Court to order the plaintiff to deposit the

SOLICITOR— *concluded.*

sum of R9,000 as security for the same. *Held,* that in the absence of fraud or collusion between the parties, the solicitor was entitled to be paid his taxed costs, by the plaintiff, up to R5,853, being the amount paid by the plaintiff after notice of the lien. The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs; and in enforcing it the Court must be guided by the principles of English law. Whether the solicitor moves the Court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction. *Devkabai v. Jefferson, Bhaishankar and Dinsha, I. L. R. 10 Bom. 248,* and *Khetter Kristo Mitter v. Kally Prosunno Ghose, I. L. R. 25 Calc. 887,* followed. *Ramdoyal Serowgee v. Ramdeo, I. L. R. 27 Calc. 269,* dissented from. *Held,* also, that the giving of a negotiable security by the plaintiff to Lakshmibai operated as a conditional payment only and not as a satisfaction of the debt. *In re Romer and Haslam (1893), 2 Q. B. 286 at p. 296,* followed. CULLIANJI *v.* RAGHOWJI (1904) . . **I. L. R. 30 Bom. 27**

SPECIAL DAMAGE.

See CIVIL PROCEDURE CODE.

SPECIFIC LEGACY.

See PROBATE AND ADMINISTRATION ACT (V OF 1881) . . **10 C. W. N. 58**

SPECIFIC PERFORMANCE.

See EXECUTION OF DECREE. **10 C. W. N. 345**

See GUARDIAN . **10 C. W. N. 763**

See JURISDICTION. **I. L. R. 33 Calc. 1065**

See SPECIFIC RELIEF ACT. **I. L. R. 30 Bom. 457**

——— *Delay in bringing suit—Laches—Limitation.*—Delay, which is short of the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right is no bar to a suit for specific performance, unless it is shown to have prejudiced the defendant. *Lindsay Petroleum Company v. Hurd, L. R. 5 P. C. 221,* and *Jamnadas Shankarlal v. Atmaram Harjivan, I. L. R. 2 Bom. 133,* referred to. KISSEN GOPAL SADANEY *v.* KALLY PROSONNO SETT (1905) . **I. L. R. 33 Calc. 633**

SPECIFIC RELIEF ACT (I OF 1877).

See LEASE . **I. L. R. 33 Calc. 203**

——— s. 9.

See LIMITATION ACT, SCH. II, ART. 142. **10 C. W. N. 1081**

SPECIFIC RELIEF ACT (I OF 1877)— *concluded.*

——— s. 31—*Sale—Suit for specific performance — Rectification — Mutual mistake — Clear proof.*—To establish a right to rectification of a document it is necessary to show that there has been either fraud or mutual mistake. Under the terms of s. 31 of the Specific Relief Act (I of 1877), it is necessary that the Court should find it clearly proved that there was such mistake. "A person, who seeks to rectify a deed upon the ground of mistake, must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought." *Fowler* v. *Fowler (1859), 4 D. & J. 250 at p. 264,* followed and applied. MADHABJI *v.* RAMNATH (1906). **I. L. R. 30 Bom. 457**

——— s 42—*Civil Procedure Code (Act XIV of 1882), s. 283—Suit brought under s. 283 not liable to dismissal, because no further relief asked.*—The special right conferred by s. 283 of the Code of Civil Procedure on a claimant, whose claim is rejected, to sue for a declaration of his title in so far as it is affected by the order passed against him is not controlled by the proviso to s. 42 of the Specific Relief Act, and the plaintiff in such a suit is not bound to ask for any further relief, to which he may be entitled. *Kunhiamma* v. *Kunhunni, I. L. R. 16 Mad. 140,* overruled. *Ambu* v. *Ketlilama, I. L. R. 14 Mad. 23,* followed. KRISTNAM SOORAYA *v.* PATHMA BEE (1905) . **I. L. R. 29 Mad. 151**

——— s. 42—*Declaratory decree—Suit to declare that a person was not adopted by the plaintiff.*—The setting up of an adoption alleged to have been made by the plaintiff is such an infringement of his right as sole owner as to entitle him to sue for a declaratory decree under s. 42 of the Specific Relief Act declaring that the person alleged to have been adopted is not his adopted son. It is not necessary for the maintainability of such a suit that a claim must be set up by the party alleged to have been adopted. CHINNASAMI MUDALIAR *v.* AMBALAVANA MUDALIAR (1905). **I. L. R. 29 Mad. 48**

SPES SUCCESSIONIS.

——— *Mahomedan Law.*—A mere *spes successionis* is unknown to, and not recognised by, Mahomedan Law. ABDOOL HOOSEIN *v.* GOOLAM HOOSEIN (1905) . . **I. L. R. 30 Bom. 304**

STAMP.

See ACT II OF 1899, SCH. I, ART. 1.
I. L. R. 33 Calc. 298, 436

STAMP ACT (II OF 1899).

——— s. 12—*Stamp—Promissory note—Stamp not cancelled—Evidence of consideration for debt aliunde admissible.*—Plaintiff sued for the recovery of a loan secured by a promissory note. When the promissory note was produced in Court it was found that the stamp on it had not been cancelled, and it was therefore treated as an unstamped document and the Court refused to allow other evidence to be given of the debt. *Held,* that evidence of the debt was admissible *aliunde.* When a cause of action for money is once complete in itself, whether for goods sold or money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always as a rule sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. *Sheikh Akbar* v. *Sheikh Khan, I. L. R. 7 Calc. 256,* followed. BANARSI PRASAD *v.* FAZAL AHMED (1905) . . . . **I. L. R. 28 All. 298**

STAMP ACT (II OF 1899)— *concluded.*

——— Sch. I, Art. 1—*Stamp—Construction of document—Memorandum of account—Acknowledgment of debt—Admissibility of evidence.*—The plaintiff sued for the recovery of certain sums of money lent by her deceased husband to the defendants, a firm of bankers, and she produced in support of her claim two documents described in the lower Courts as *sarkhats.* These were documents in the form of extracts from bankers' books showing a credit and debit side and in one case a balance struck, but they were not signed by the parties or either of them, and they contained no acknowledgment of or promise to pay a debt. They were not stamped. *Held,* that these papers were merely memoranda, which might be given in evidence for what they were worth, but did not require to be stamped. *Udit Upadhya* v. *Bhawani Din, I. L. R. 27 All. 84,* referred to. DULMHA KUNWAR *v.* MAHADEO PRASAD (1906) . . **I. L. R. 28 All. 436**

STATUTE, CONSTRUCTION OF.

——— *Land Acquisition Act (I of 1894), ss. 12 and 18—Notice by the Collector—Reference to Court—Meaning of word "immediately."*—Where a statute or written contract provides that a certain thing shall be done "immediately" regard must be had, in construing that word, to the object of the statute or contract as the case may be, to the position of the parties and to the purpose for which the Legislature or the parties to the contract intend that it shall be done immediately. IN RE LAND ACQUISITION ACT (1905) **I. L. R. 30 Bom. 275**

STATUTE, INTERPRETATION OF.

See CIVIL PROCEDURE CODE, s. 102.
10 C. W. N. 991

See TRANSFER OF PROPERTY ACT, s. 95.
10 C. W. N. 626

STATUTES.

——— **24 and 25 Vict., Cap. CLIV.**

See ACT (LOCAL) II OF 1901, s. 20.
I. L. R. 33 Calc. 696

STATUTORY ROAD.

See PORT COMMISSIONERS' ACT (BENGAL ACT V OF 1870), ss. 5, 6, 31, 38, 39.
I. L. R. 33 Calc. 1243

STRIDHAN.

See HINDU LAW.
I. L. R. 33 Calc. 315, 345
I. L. R. 30 Bom. 431

See MITAKSHARA.
I. L. R. 30 Bom. 333

STRIDHAN AYANTUKA.

See HINDU LAW.
10 C. W. N. 1, 510, 802

SUB-MORTGAGE.

See MORTGAGE. **I. L. R. 33 Calc. 638**

SUB-SOIL RIGHTS.

See LEASE . **I. L. R. 33 Calc. 203**

SUCCESSION.

See CUTCHI MEMONS.
I. L. R. 30 Bom. 197, 270

See HINDU LAW.
I. L. R. 33 Calc. 187, 247, 307, 345, 458
I. L. R. 30 Bom. 607
10 C. W. N. 95, 510, 802

See LANDLORD AND TENANT.
10 C. W. N. 17

See PRACTICE . **10 C. W. N. 230**

See RELIGIOUS ENDOWMENT.
I. L. R. 33 Calc. 689

SUCCESSION ACT (X OF 1865).

See ADMINISTRATION BOND.
10 C. W. N. 673

——— **ss. 20, 22, 105**—*Relationships contemplated by the Act are legitimate relationships only—Gift by will of the residue to such charities as the trustees may think deserving, is good.*—The Succession Act (X of 1865) contemplates only those relationships, which the law recognizes, that is, those flowing from a lawful wedlock. The gift, by will, of the residue to "such charities as the trustees may think deserving" is a good gift, the objects being wholly charitable. SMITH *v.* MASSEY (1906).
I. L. R. 30 Bom. 500

SUCCESSION ACT (X OF 1865)—*continued.*

——— **ss. 82, 111, 116, 117.**

See HINDU LAW.
I. L. R. 33 Calc. 947, 1306

——— **s. 101.**

See WILL . **I. L. R. 30 Bom. 477**

——— **s. 107.**

See PLEDGE.

See REGISTRATON ACT.
I. L. R. 30 Bom. 304

——— **ss. 111, 116**—*Hindu Law—Will—Construction—Authority to adopt—Bequest to adopted son—Authority to adopt declared invalid—Gift over to daughters—Testacy or intestacy—Nature of interest taken by each daughter—Daughter with natural children and daughter with adopted child—Preferential right to inherit—Meaning of "to whom and whose respective sons I give, devise and bequeath the same"—Limitation, words of—Succession Act (X of 1865), ss. 111, 116 and 117.*—S. 111 of the Succession Act only applies when the prior bequest is capable of taking effect and is not *ab initio* void. If a bequest has failed *ab initio*, s. 116 applies. A testator by his Will authorised adoptions in a manner which, in a suit brought by the adopted son, was held to be invalid under the Hindu Law. The Will further directed that in case "some of such adopted sons surviving his wife and dying under the age of 18 years without leaving a son or sons, his executors should make over and divide the whole of the estate both real and personal into and between his daughters in equal shares, to whom and their respective sons he bequeathed the same." *Held*, that s. 116 of the Succession Act, incorporated in the Hindu Wills Act, applied and this constituted a gift over to the daughters. That the gift, a valid gift to the adopted sons, having failed, the daughters became entitled to the estate absolutely and in equal shares, and the words "their respective sons" in the above clause were words of limitation and not words of purchase. Though under the Hindu Law a Hindu married daughter takes by inheritance a limited estate, she takes an absolute estate under a devise by Will, unless her interest is curtailed by express words or by necessary implication. *Ramasami* v. *Papayya, I. L. R. 16 Mad. 466, Lala Ram Jewan Lal* v. *Dal Koer, I. L. R. 24 Calc. 406, Musst. Kalany Koer* v. *Lachmee Pershad, 24 W. R. 395, Bhobatarini Debya* v. *Peary Lal Sanyal, I. L. R. 24 Calc. 646, Atul Krishna Sarcar* v. *Sanyasi Charan Sircar, 9 C.W. N. 784.* The Court, following the practice laid down in *Lalit* v. *Chukkun, L. R. 24 I. A. 76*, left the question, whether the gift is defeasible on either daughter dying without male issue, open. Under the Hindu Law an adopted son holds the same position as a son born as regards inheritance from the adoptive mother's relations. RADHA PROSAD MULLICK *v.* RANI MONI DASSI (1906) . **10 C. W. N. 695.**

SUCCESSION ACT (X OF 1865)—concluded.

——— s. 187—*Will—Application by legatee for letters of administration—Grant limited to recovery of legacy only—Suit by another legatee to recover legacy—Maintainability—Proof of Will only essential.*—Letters of administration with a copy of the Will annexed in respect of the entire estate left by the testator was granted by the District Judge to a legatee to whom the testator had bequeathed an allowance for maintenance. On appeal, the High Court directed that the letters should be limited to the realisation by the grantee of that allowance only. But before fresh letters in terms of the High Court's order could be issued by the District Judge, the legatee died. Subsequently another legatee to whom also the testator had bequeathed an allowance for maintenance brought a suit for recovery of the same. *Held*, that s. 187 of the Succession Act was no bar to the recovery of the plaintiff's claim. If a Will is once proved and probate or letters of administration granted, that would entitle any one of the legatees or any one claiming under the Will to obtain relief from Court. S. 187 of the Succession Act does not contemplate that every legatee claiming under a Will should have to obtain separate probate or letters of administration in respect of the estate or a portion of the estate in order to be entitled to maintain a claim for the legacy. CHANDRA KISHORE ROY *v.* PROSANNA KUMAR DASS (1906) **10 C. W. N. 864**

——— ss. 242, 257, 269.

See ADMINISTRATION BOND.

SUCCESSION CERTIFICATE ACT (VII OF 1889).

——— ss. 3 (2), 8 and 9—*Grant of certificate—Order to file security—Practice.*—Where a Judge acting under s. 9 of the Succession Certificate Act requires security to be furnished by a person to whom a certificate of succession is granted, the amount of the security should be specified in the order and a time should be prescribed within which the security must be furnished. *Semble*—That s. 8 of the Act cannot be applied to the case of the fixed deposit in a bank, such not being a security within the meaning of section 3 (2). GULBAJI KUNWARI *v.* JAGDEO PRASAD (1906) . **I. L. R. 28 All. 477**

——— s. 4—*Certificate not necessary in so far as the decree is made enforceable against mortgaged property, but necessary so far as the decree imposes personal liability.*—A decree for the enforcement of a mortgagee's rights as against the mortgaged property is not a decree for a 'debt' within the meaning of s. 4 of Act VII of 1889; but it would be otherwise with reference to a personal decree for the debt, and a certificate will be a condition precedent to such a personal decree. *Fateh Chand* v. *Muhammad Bakhsh, I. L. R. 16 All. 259*, not followed. PALANIYANDI PILLAI *v.* VEERAMMAL (1905) . . **I. L. R. 29 Mad. 77**

SUIT.

See ADMINISTRATION BOND.

See ATTACHMENT.

See DEKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879).

——— *Suit—Omission of part of claim—Withdrawal without leave—Fresh suit for claim omitted, if barred—Leave to withdraw on condition—Non-fulfilment of condition—Effect.*—If a plaintiff withdraws from a suit without the leave of the Court, s. 43 of the Civil Procedure Code is a bar to his instituting a fresh suit in respect of any portion of the claim, which he may have omitted to include in his previous suit. The same consequences follow when a plaintiff is allowed to withdraw with liberty to bring a fresh suit on condition of paying the defendants costs within a certain time and fails to pay such costs within that time. HARE NATH DAS *v.* HOSSAIN ALI (1905). **10 C. W. N. 8**

——— *Right of suit—Parties.*—S. 315 of the Civil Procedure Code is only an enabling section and not prohibitive of an independent action in a Civil Court. A suit was brought by an auction-purchaser for the recovery of purchase-money from the decree-holder, who had received it, on the ground that the judgment-debtor had no title to the property sold. *Held*, that the suit was not barred by the provisions of s. 315 of the Civil Procedure Code. That the judgment-debtor was not a necessary party. SURENDRA NATH GHOSE *v.* BENI MADHAB MISRA (1905). **10 C. W. N. 274**

SUIT FOR ADMINISTRATION OF TRUST.

See CIVIL PROCEDURE CODE, s. 539. **I. L. R. 33 Calc. 112**

SUIT FOR PARTITION OF IMMOVEABLE PROPERTY.

See CIVIL PROCEDURE CODE, s. 396. **I. L. R. 33 Calc. 75**

SUIT FOR RESTITUTION OF CONJUGAL RIGHTS.

See ACT XII OF 1887, SS. 15, 18 AND 19. **I. L. R. 33 Calc. 545**

——— *Suits Valuation Act (VII of 1887), ss. 9 and 21—Valuation of suit—Jurisdiction.*—A suit for restitution of conjugal rights is not a suit, which is of necessity excluded from the jurisdiction of a Munsif. The value of such a suit is, as a rule, the value which the plaintiff chooses to put upon it, provided that the suit be not unwarrantably undervalued or overvalued from improper motives. *Aklemannessa Bibi* v. *Mahomed Hatem, I. L. R. 31 Calc. 849*, dissented from. *Golam Rahman* v. *Fatima Bibi, I. L. R. 13 Calc. 232, Mowla Newaz* v. *Majid-un-nissa Bibi, I. L. R. 18 Calc. 378, Shire* v. *Shire, 5 Moo. P. C. 81*, and *D'Orliac* v. *D'Orliac, 24 Moo. P. C. 374*, distinguished. *Shedion Ram* v. *Tulshi Ram, I. L. R. 15 All. 378*,

SUIT FOR RESTITUTION OF CONJUGAL RIGHTS—*concluded.*

Jag Lal v. *Hur Narain Singh*, I. L. R. 10 All. 524; *Mahabir Singh* v. *Bekari Lal*, I. L. R. 13 All. 320, *Madho Das* v. *Ramji Pathak*, I. L. R. 16 All. 286, and *Lakshman Bhatkar* v. *Babaji Bhatkar*, I. L. R. 8 Bom. 31, referred to. ZAIR HUSAIN KHAN v. KHURSHED JAN (1906).

I. L. R. 28 All. 545

SUIT IN FORMÂ PAUPERIS.

——— *Civil Procedure Code (Act VIII of 1859), s. 309—Suit in formâ pauperis—Successful petitioner—Charge of Government for Court-fees—Crown debt, priority of.*—S. 411 of the Civil Procedure Code is an enabling section. Though it indicates the manner, in which the Crown may proceed to realise Court-fees of a successful *pauper* plaintiff, which form a Crown debt, it does not preclude the Crown or its representative from urging its prerogative and insisting on its right to precedence over all other creditors. A successful *pauper* plaintiff, attached and sold for her costs certain property, other than the property in suit, belonging to the judgment-creditor. The sale-proceeds were paid into Court. The plaintiff's Solicitor applied to have his costs paid out of the sale-proceeds. The Government Solicitor also applied to have his certified Court-fees paid to him out of the fund in Court: *Held*, that the Government Solicitor was entitled to precedence and that it was not necessary for him to attach the fund before getting payment. *Secretary of State* v. *The Bombay Landing and Shipping Co., Ld.*, 5 Bom. H. C. 23 (O. C. J.); *Gunput Putaya* v. *The Collector of Kanara*, I. L. R. 1 Bom. 7; *Gulzari Lal* v. *Collector of Bareilly*, I. L. R. 1 All. 596; *The Collector of Moradabad* v. *Muhammad Daim*, I. L. R. 2 All. 196; *Ramdas* v. *The Secretary of State*, I. L. R. 18 All. 419; and *Bell* v. *The Municipal Commissioners*, I. L. R. 25 Mad. 457, referred to. GYANODA BALA DASEE v. BUTTO KRISHNA DASS BAIRAGEE (1906)

10 C. W. N. 857

SUITS, CIVIL AND POLITICAL.

See PRIVY COUNCIL.

I. L. R. 33 Calc. 219

SUITS VALUATION ACT (VII OF 1887)

——— **ss. 9 and 21.**

See ACT XII OF 1887, SS. 15, 18 AND 19.

I. L. R. 28 All. 545

See CIVIL COURTS ACT (XII OF 1887).

See SUIT FOR RESTITUTION OF CONJUGAL RIGHTS.

SURETY.

See ADMINISTRATION BOND.

I. L. R. 33 Calc. 713
10 C. W. N. 673

See ESTOPPEL.

SURVIVORSHIP.

See HINDU LAW **I. L. R. 33 Calc. 676**

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TAXATION.

——— *Practice—Attorney and client's costs payable out of estate—Counsel's fee excessive—Disallowance on taxation—Belchambers' Rules and Orders, 780, 785.*—Where on a motion for discharge of guardians the Court ordered the guardian's cost of opposing the application to be taxed as between attorney and client and paid out of the estate. *Held*, that the Taxing officer was right in disallowing as against the estate an excessive fee paid to counsel for appearing on the application, and should only allow the excess even as against the client, when it was manifestly shown that the client knew that the fee was excessive and that he might be called upon personally for the excess. The duties of a Taxing Master explained. IN THE MATTER OF THAKUR DASSEE DASSEE (1906).

I. L. R. 33 Calc. 827

TENURE.

See LANDLORD AND TENANT.

I. L. R. 33 Calc. 566

THEATRE.

See BOMBAY MUNICIPAL ACT.

——— *City of Bombay Municipal Act (Bombay Act III of 1888), s. 249—Place of public resort.*—A theatre is a place of public resort and as such falls within the purview of s. 244 of the City of Bombay Municipal Act (Bombay Act III of 1888). EMPEROR v. DWARKADAS (1905).

I. L. R. 30 Bom. 392

TIDAL RIVER.

See FISHERY . **10 C. W. N. 540**

TITLE.

See ADVERSE POSSESSION.

See LIMITATION ACT, SCH. II, ART. 142.

10 C. W. N. 630

See RES JUDICATA.

I. L. R. 33 Calc. 1101

TORT.

——— *Tort—Master and servant—Malicious prosecution—Damages for—Implied authority in the servants—Acting in Master's interest—Zemindar and Naib.*—The defendant No. 1, who was a peon under defendant No. 2, the Naib of defendant No. 3, prosecuted the plaintiff in the Criminal Court, but the plaintiff was found not guilty and acquitted. In a suit subsequently brought by the plaintiff against the defendants Nos. 1, 2, 3 to recover

TORT—*concluded.*

damages for malicious prosecution, it was found that the prosecution of the plaintiff was started by the defendant No. 1 under the orders of the defendant No. 2 in the interest of and for the benefit of defendant No. 3 and that all the expenses in the prosecution of the criminal case were borne by the estate of the defendant No. 3: *Held*, that the defendant No. 3 is answerable for the wrongful acts of his servants, defendants Nos. 1 and 2, and is liable to pay damages to the plaintiff, it being clear that there was an implied authority in the Naib, defendant No. 2, under whose orders the defendant No. 1 was acting, in starting the prosecution against the plaintiff, and the object of the servant's action was to advance their master's cause. SARAT CHANDRA ROY CHAUDHURY *v.* DAWLAT SINGH (1905).
10 C. W. N. 72

TRADE MARK.

See APPEAL . . **10 C. W. N. 7**
See CAUSE OF ACTION **10 C. W. N. 107**
See PENAL CODE.

——— *Seller's design—Rights of manufacture—Partnership—Dissolution—Partner continuing the business—Right to sue in respect of trade mark.*—In the year 1892 *M* designed a label for goods ordered by his firm C. J. & Co. from J. F. A. & Co., the London manufacturers. The label consisted of a youth and girl in fancy dress and goods bearing the label became known in Bombay and up-country as 'Jori Mal.' By *M*'s request the name of C. J. & Co. was printed on the border of the label in Persian and Gujarati characters. In 1897 *M*'s partner having retired from the firm, *M*, the fourth plaintiff, continued the business of C. J. & Co. with the other plaintiffs, under the name, style and firm of V. & Co. V. & Co. then ordered goods bearing the label from B. W. A. & Co. in London, instructing them to place on the border of the label the name of their firm, V. & Co., in English, Persian and Gujarati characters. In 1898, B. W. A. & Co. having become insolvent, the plaintiffs imported goods, without the label, from B. & Co., the defendants, who had taken up the business of B. W. A. & Co. In 1899, the plaintiffs requested the defendants to arrange, if possible, to send out the goods under the "Jori Mal" label. In 1900, the defendants, having purchased from B. W. A. & Co. their rights under the label, proceeded to place it on goods manufactured for and sold by them, leaving the border of the label blank, or inserting on the border their own name, or, by special request, the names of the constituents, by whom the goods were ordered. It was not expressly agreed that B. W. A. & Co. should not supply goods under the label to constituents other than the plaintiffs. The lower Court held, *inter alia*, (1) that the plaintiffs had lost their right to the exclusive user of the label as against the defendants, and (2) that the plaintiffs were not entitled to the rights, if any, of the firm of C. J. & Co. to the label. On appeal by the plaintiffs: *Held*, the plaintiffs have failed to establish an exclusive right to the label. In the absence of

TRADE MARK—*concluded.*

contract, a seller of goods has no exclusive right to a mark, which merely denotes goods, which he sells, even though he may have designed the mark himself. Such a mark may be a mere quality mark, indicating the reputation of the goods, irrespective of the reputation of the seller. Obviously every trader being entitled, if not bound, to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exists in such case. His reputation is not injured and no deception is practised on the public. To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in or connected with the origin or history of the goods. In such cases the public are invited to rely on the reputation of the persons denoted, and no other person can, without their authority, make such representation. It is a question of evidence in each case, whether there is false representation or not. *Held*, also, a trade mark, belonging to a firm, would in the absence of express provisions to the contrary, as part of the partnership assets, be available for any partner of that firm, carrying on that business. *Hirsch* v. *Jonas, (1876) 3 Ch. D. 584*, followed. *Damodar Ruttonsey* v. *Hormusjee Adarjee* (unreported), distinguished. VADILAL *v.* BURDITT & Co. (1905) . **I. L. R. 30 Bom. 61**

——— *'Labham,' meaning of—Transfer of Property Act (IV of 1882), s. 35 (b)—Exception not applicable where debt not the whole consideration—Probate and Administration Act (V of 1881), ss. 128, 130, 131—Interest allowable on demonstrative legacies—Demonstrative legatee, right of, to resort to general assets.*—The word 'Labham' is generic and covers different kinds of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest and dividends and income from immoveable property, specially where other portions of the will show such to have been the intention of the testator. The exception in paragraph (*b*) of s. 135 of the Transfer of Property Act will apply only where the whole of the consideration for the transfer is a debt due by the transferor. The rule that in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended will not apply, where there are directions to the contrary by the testator. Under the English Law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death. *Mullins* v. *Smith, 1 Drewry & Smale's Rep. 204*, approved and followed. *Lord Londesborough* v. *Somerville, 19 Beav. 295*, approved and followed. The same is the Law in India and the absence of a distinct provision in ss. 128, 130 and 131 of the Probate and Administration Act with respect to interest on such legacies does not imply an intention to disallow interest in such cases. CHINNAM RAJAMANNAR *v.* TADIKONDA RAMACHENDRA RAO (1905).
I. L. R. 29 Mad. 155

TRANSFER.

See APPEAL . I. L. R. 33 Calc. 580

See BENGAL TENANCY ACT, s. 11.
10 C. W. N. 272

See CHOWKIDARI CHAKRAN ACT.

See CIVIL COURTS ACT, s. 8.
10 C. W. N. 841

See CIVIL PROCEDURE CODE, s. 25.
10 C. W. N. 12, 240

See CRIMINAL PROCEDURE CODE.

See HINDU LAW—MAINTENANCE.
10 C. W. N. 1074

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 531

TRANSFER OF CRIMINAL CASE.

——— *Criminal Procedure Code (Act V of 1898), s. 526—Reasonable apprehension in the mind of the accused—Incidents and circumstances calculated to create apprehension.*—A Magistrate is bound to postpone the hearing of a case for the purpose of enabling a party to apply to a higher Court for a transfer and his refusal to do so renders the subsequent proceedings voidable, if not void. *Queen-Empress* v. *Gayitri Prosunno Ghosal, I. L. R. 15 Calc. 455, Surat Lal Chowdhry* v. *Emperor, I. L. R. 29 Calc. 211,* and *Kishori Gir* v. *Ram Narayan Gir, 8 C. W. N. 77,* followed. If the words used by and the actions of a judicial officer, though susceptible of explanation and traceable to a superior sense of duty are calculated to create in the mind of the accused an apprehension that he may not have an impartial trial, the case should be transferred to some other Judge for trial. *Dhone Kristo* v. *King-Emperor, I. L. R. 31 Calc. 715,* and *Joharuddin* v. *Emperor, 8 C. W. N. 910,* referred to. Confidence in the administration of justice is an essential element in good government and a reasonable apprehension of failure of justice in the mind of the accused should be taken into consideration on an application for transfer. *Narain Chundra Banerjee* v. *The Howrah Municipality, 10 C. W. N. 441,* explained. *Held per* HOLMWOOD, *J.* The case should be transferred in view of the technical objection that may be taken to the validity of the Magistrate's final decision, owing to his having refused time to apply for a transfer. The views of BRETT, *J.*, as expressed in *Narain Chundra Banerjee* v. *The Howrah Municipality, 10 C. W. N. 441,* concurred with. KALI CHARAN GHOSE *v.* EMPEROR (1906).
I. L. R. 33 Calc. 1183

TRANSFER OF NON-TRANSFERABLE HOLDING.

——— *Landlord and Tenant Act (Bengal Act VIII of 1869)—Occupancy raiyat unauthorised to transfer his holding—Usufructuary mortgage, if a transfer.*—By creating an usufructuary mortgage an occupancy raiyat not authorised to transfer his holding makes himself liable to ejectment by the landlord. KRISHNA CHANDRA DATTA CHOWDHURY *v.* KHIRAN BAJANIA (1903). . 10 C. W. N. 499

TRANSFER OF PROPERTY ACT (IV OF 1882).

——— s. 2, cl. 36.

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 786

——— s. 3.

See MORTGAGE . 10 C. W. N. 276

——— s. 3.

See CONTRACT . I. L. R. 33 Calc. 702

——— ss. 4, 123.

See GIFT . . I. L. R. 33 Calc. 584

——— s. 6.

See HINDU LAW.

——— ss. 6, 19, 21—*Succession Act (X of 1865), s. 107—Document whereby a Mahomedan daughter relinquished her right of inheritance to her father's property—Vested or contingent interest—Registration Act (III of 1877), ss. 17, 18, cl. (d) and (f), 21, 24.—Held,* that the right of a son or daughter or other heir of a person to inherit his property is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definitions of a "vested interest" in s. 19 of the Transfer of Property Act (IV of 1882), or of "a contingent interest" in s. 21 of the Act and s. 107 of the Indian Succession Act (X of 1865). So far from being a vested or a contingent right, or a right in present or in future, it is, in the language of clause (*a*) of s. 6 of the Transfer of Property Act (IV of 1882), the "chance of an heir-apparent succeeding to an estate." or "a mere possibility" of succession, which cannot be transferred. ABDOOL HOOSEIN *v.* GOOLAM HOOSEIN (1905).
I. L. R. 30 Bom. 304

——— ss. 8, 70—*Mortgage—Accession to mortgaged property.—Held,* that a theatre, erected by the mortgagors on the land, after the execution of the mortgage, was, in the absence of a contract to the contrary, included in the mortgage. The Transfer of Property Act makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in ss. 8 and 70 of the Act. In this respect the Act reproduces the English law, which is, that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed. MACLEOD *v.* KISSAN (1904) I. L. R. 30 Bom. 250

——— ss. 10, 110 (g)—*Perpetual lease—Covenant against alienation without covenant for re-entry—Construction of document.*—Where a perpetual lease of a village to the lessee and his heirs contained a covenant against alienation by the lessee, but no covenant giving to the lessor a right of re-

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

entry upon breach of the former covenant, it was *held* that the successors in title of the lessor could not recover the property the subject of the lease from the alienees of the successors in title of the lessee. *Nil Madhab Sikdar* v. *Narattam Sikdar, I. L. R. 17 Calc. 826,* and *Parameshri* v. *Vittappa Shanbaga, I. L. R. 26 Mad. 157,* followed. NETRAPAL SINGH *v.* KALYAN DAS (1906) . **I. L. R. 28 All. 400**

——— **ss. 14, 15 and 123**—*Trust validly created by registered instrument without delivery of possession—Ss. 14 and 15 of the Transfer of Property Act do not affect any rule of Hindu Law—Hindu Law—Gift—Settlement on persons then in existence at close of a life in being valid—Trusts Act (II of 1882), s. 6.*—*R* by a registered deed of settlement settled property in trust and after making various provisions for the maintenance of himself and his wife and his grand-daughters *V* and *R* further provided that on the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand-daughters, who attain 18 and the daughters of the grand-daughters, who should attain that age or marry. A female child on the consummation of marriage or on attaining 18 was to be given R1,000, and a male child on attaining age was to be given his share of the property. The settlor did not give possession of the properties to his trustees, but remained in possession till his death. In a suit by the reversioners of *R* to set aside the settlement as null and void. *Held,* that a transfer of property and a valid declaration of trust were effected by the registered deed, though unaccompanied by physical delivery of possession and that nothing in s. 6 of the Trusts Act was in conflict with this view. *Held* also, that the settlement by way of remainder in favour of the sons of *V* and *R* (such sons being in existence at the date of the settlement) was valid under the Hindu Law. A settlement by way of remainder to take effect on the happening of an event following immediately on the close of a life in being is good. *Sreemuthy Soorjumoney Dossee* v. *Denobundoo Mullick, 9 M. I. A. 134,* followed. A bequest to a class, some of whom could not take, is not void, but will enure for the benefit of such of the class, who can take. The rule in *Leake* v. *Robinson, 2 Mer. 363,* does not apply to the wills of Hindus. *Bhagabati Barmanya* v. *Koli Charan Singh, I. L. R. 32 Calc. 992* referred to and followed. *Ram Lal Sett* v. *Kanai Lal Sett, I. L. R. 12 Calc. 663,* referred to and followed. Ss. 14 and 15 of the Transfer of Property Act do not affect the rule of Hindu Law above stated and do not apply to Hindu wills. In determining the validity or otherwise of dispositions of property under ss. 14 and 15 of the Transfer of Property Act regard must be had to possible events and not to events as they have actually happened; and if it is possible that the vesting may be postponed beyond the limits fixed by the sections, the disposition will be bad, although, as events actually happened, it was not so postponed. RANGANADHA MUDALIAR *v.* BAGIRATHI AMMALL (1906).

I. L. R. 29 Mad. 412

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

——— **s. 35 (b)**—*Exception not applicable, where debt not the whole consideration—Will, construction of—'Labham,' meaning of—Probate and Administration Act (V of 1881), ss. 128, 130, 131—Interest allowable on demonstrative legacies—Demonstrative legatee, right of, to resort to general assets.*—The word 'Labham' is generic and covers different kinds of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest and dividends and income from immoveable property, especially where other portions of the will show such to have been the intention of the testator. The exception in paragraph (*b*) of s. 135 of the Transfer of Property Act will apply only where the whole of the consideration for the transfer is a debt due by the transferor. The rule that in the case of demonstrative legacies the legatee is entitled to resort to the general assets on failure of the source intended will not apply, where there are directions to the contrary by the testator. Under the English law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death. *Mullins* v. *Smith, 1 Brewry and Smale's Rep. 204,* approved and followed. *Lord Londesborough* v. *Somerville, 19 Beav. 295,* approved and followed. The same is the law in India and the absence of a distinct provision in ss. 128, 130 and 131 of the Probate and Administration Act with respect to interest on such legacies does not imply an intention to disallow interest in such cases. CHINNAM RAJAMANNAR *v.* TADIKONDA RAMACHENDRA RAO (1905).

I. L. R. 29 Mad. 155

——— **ss. 37, 109**—*Misjoinder of parties and causes of action—No misjoinder, where one relief merely ancillary—Landlord and tenant—Rights and liabilities of joint lessors and lessors, who are tenants-in-common.*—A suit is bad for misjoinder, where there is a joinder of two causes of action, in each of which all the defendants are not interested. Where, however, there is really only one cause of action against some defendants, and the relief claimed against the other defendants is only ancillary to the relief to be given to the plaintiff in respect of such cause of action, the suit is not bad for misjoinder. *Saminada Pillay* v. *Subba Reddiar, I. L. R. 1 Mad. 333,* distinguished. *Per* SIR S. SUBRAHMANIA AYYAR, *Officiating C. J.*—A tenant-in-common may have ejectment to the extent of his interest, on proper notice to quit; and the inclusion in such a suit of the other co-sharers, as defendants, is merely the inclusion of persons properly parties to the proceeding and not of litigants against whom a separate claim, having no connection with the ejectment, is made. *Per* SANKARAN NAIR, *J.*—The distinction between the law in England and India as to the rights and liabilities of joint lessors and lessees discussed and explained; as also the rights of lessors, who are tenants-in-common. Case law, English and Indian, on the subject, considered. Where the relation is created by contract with several joint landlords, according to the English cases, such relation subsists only so long as all of them wish it

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

to continue, while according to the Indian cases it subsists, until all of them agree to put an end to it; and such a contract cannot, in the absence of special circumstances, be put an end to by any one of them, if they continue to hold as joint tenants. This principle, however, will not apply when the suit is for ejectment and partition and all the co-owners are made parties. The principles embodied in ss. 37 and 109 of the Transfer of Property Act ought to be applied in such cases, though they are not expressly declared applicable. When the lessor recognises the right of another in the premises demised, all the obligations of the lessee, as to payment of rent and surrender of possession, must, if such obligation be severable, and the lessee will not be prejudiced by such severance, be performed by the lessee between the lessor and such other, in such proportions as may be settled by all the parties concerned, including the lessee. If the matter has to be decided by suit, the lessor, lessee and such other person will be necessary parties. SIMHADRI APPA RAO *v.* PRATTIPATI RAMAYYA (1905).

I. L. R. 29 Mad. 29

——— **ss. 39 and 100**—*Maintenance—Charge—Decree on compromise creating a charge—Bonâ fide transferees for value without notice.*—*B* instituted a suit to recover certain property from *M*, who was entitled to maintenance. The suit resulted in a decree incorporating a compromise. *M* sued *B* and certain transferees for value without notice to recover arrears of maintenance by the sale of certain property charged by the above decree with the payment of the maintenance. *Held (a)* that s. 39 of the Transfer of Property Act had no application; *(b)* that, it being clear upon the construction of the decree that it was the intention of the parties to create a charge on the property for the payment of maintenance within the meaning of s. 100 of the Transfer of Property Act, the charge could be enforced against *bonâ fide* transferees for value without notice. *Harjas Rai v. Naurang, Weekly Notes, 1906, p. 82,* distinguished. MAINA *v.* BACHCHI (1906).

I. L. R. 28 All. 655

——— **s. 40**—*Trust Act (II of 1882), s. 91—Mortgagee with knowledge of facts which might have revealed the existence of an equitable right bound by such right.*—Where a mortgagee, at the time of his mortgage, is aware of circumstances, which ought to have put him on enquiry, and such enquiry, if made, would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights will, on the principles embodied in s. 40 of the Transfer of Property Act and s. 91 of the Trusts Act, be postponed to the rights of such third party. KAMESWARAMMA *v.* SITARAMANUJA CHARLU (1905).

I. L. R. 29 Mad. 177

——— **s. 43**—*Mortgagor acquiring the mortgaged property cannot use the mortgage right as a shield against subsequent mortgages executed by himself.*—The doctrine that a person paying off mortgage or purchasing the mortgaged property in execution of a decree on the mortgage can set up such mortgage as a shield against puisne incumbrancers will not, on the principle embodied in s. 43 of the Transfer of Property Act, apply, when the person so paying or purchasing is the mortgagor himself. The effect of the payment or purchase in such cases so far as the mortgagor and those claiming under him are concerned will be simply to extinguish the mortgage, and the rights of subsequent incumbrancers will be determined as if such prior mortgage never existed. MANJAPPA ROI *v.* KRISHNAYYA (1905).

I. L. R. 29 Mad. 113

——— **s. 52**—*Lis pendens—Contentious suit.*—Where there are several defendants to a suit, the suit does not become "contentious" within the meaning of s. 52 of the Transfer of Property Act, 1882, only when all the defendants are served with summonses in the suit, nor can a suit be contentious as regards some of the defendants and not contentious as regards others. *Parsotam Saran v. Sanehi Lal, I. L. R. 21 All. 408,* discussed and doubted. CHATARBHUJ *v.* LACHMAN SINGH (1905) . **I. L. R. 23 All. 196**

——— **s. 52**—*Lis pendens—Suit for maintenance by widow praying it to be charged on immoveable property—Right to immoveable property in dispute in such suit.*—A suit in which a widow claims to get her maintenance made a charge on immoveable property is one in which a right to such immoveable property is directly and specifically in question within the terms of s. 52 of the Transfer of Property Act; and any transfer of the property during the pendency of the suit, not effected for the purpose of paying off any debt entitled to priority over the claim for maintenance, will be affected by the *lis pendens* created by the suit. *Bazayet Hossain v. Dooli Chand, I. L. R. 4 Calc. 402 at p. 409,* referred to and followed. DOSE THIMMANNA BHUTA *v.* KRISHNA TANTRI (1906).

I. L. R. 29 Mad. 508

——— **s. 52**—*The doctrine of lis pendens, applies to cases, in which decrees are passed on compromise—'Contentious suit or proceeding,' meaning of.*—The doctrine of *lis pendens* as embodied in s. 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding, even when such suit or proceeding is subsequently compromised and a decree passed in pursuance of such compromise, provided such compromise is not tainted by fraud or collusion. The word 'contentious' is used in s. 52 of the Transfer of Property Act in the sense in which it is used in Probate Practice and means the opposite of common form or voluntary business. ANNAMALAI CHETTIAR *v.* MALAYANDI APPAYA NAIK (1905).

I. R. R. 29 Mad. 426

——— **s. 54**—*Enforceable contract of sale followed by delivery of possession to defendant, but not followed by registered sale-deed no defence to suit for possession—Construction of statute.*—The provisions of s. 54 of the Transfer of Property Act

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are imperative, and Courts will not be justified in disregarding them on equitable grounds. Where the words of a statute are clear and unambiguous, effect must be given to them, although hardship may result in individual cases. A contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover. *Ramasami Pattar* v. *Chinnan Asari, I. L. R. 24 Mad. 449*, approved. *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami, I. L. R. 24 Mad. 377*, considered. KURRI VEERABEDDI v. KURRI BAPIREDDI (1905).

I. L. R. 29 Mad. 336

——— **s. 55**—*Limitation Act (XV of 1877) Sch. II, Arts. 132, 111—Art. 132 applies to suits to enforce the charge created by s. 55 of the Transfer of Property Act.*—The statutory charge, which an unpaid vendor obtains under s. 55 of the Transfer of Property Act, is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor. *Webb* v. *Macpherson, I. L. R. 31 Calc. 57*, referred to and applied. The article of the Limitation Act applicable to a suit to enforce such charge is Art. 132 of Sch. II and not Art. 111. *Natesan* v. *Chetti Soundanraraja Ayyangar, I. L. R. 21 Mad. 141*, overruled. *Avuthala* v. *Daumma, I. L. R. 24 Mad. 233*, overruled. *Subrahmania Ayyar* v. *Poovan, I. L. R. 27 Mad. 28*, overruled. RAMAKRISHNA AYYAR v. SUBRAHMANIA AYYAR (1905) . . **I. L. R. 29 Mad. 305**

——— **ss. 55 (2), 108 (b)**—*Art. 116, Sch. II of the Limitation Act will apply only when the transaction is one to which s. 55 (2) or s. 108 (b) of the Transfer of Property Act will apply and a covenant of title or quiet enjoyment can be implied—Limitation Act (XV of 1877), Sch. II, Arts. 62, 97, 116.*—The first defendant, in September, 1897, granted in consideration of an advance, a registered karar to *P*, the predecessor in title of the present plaintiff, on the following terms: "Deed of consent or permission granted to . . . . , by . . . . . in consideration of this amount, the trees standing . . . . . shall be cut down at your expense during a period of 6 years from this date, with the exception of teak and blackwood. For every cart load of timber so removed . . . . . you are to pay a kuttikanam of R2-4-0 and on those timber, the seal of the Etam shall be impressed without delay . . . . . During the period of 6 years, the Etam shall not grant any permission to others to cut trees . . . . . You have the right to cut down trees and none whatever to the land." The first defendant and the other defendants formed a Tarward and in a suit brought on behalf of the Tarward against *P* and the first defendant, it was declared that the karar was not binding on the Tarward and *P* was restrained from cutting timber. The present suit was instituted by *P* to recover personally from the first defendant and from the Tarward

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Properties the amount advanced with interest as damages. *Held*, that the suit so far as the Tarward properties were concerned was *res judicata* by reason of the decision in the previous suit. *Held also*, that the suit as against the first defendant was barred by limitation. The article applicable to the suit is either Art. 62 or Art. 97 of Sch. II of the Limitation Act. The document is not a sale or lease of immoveable property within the definition of those terms in the Transfer of Property Act and a covenant for title or for quiet enjoyment cannot be implied under s. 55 (2) or s. 108 (b) of the Act. Art. 116 of Sch. II of the Limitation Act does not apply to the case. The document did not create a mortgage or charge on immoveable property. It is no more than an exclusive license to cut trees. A document may create an interest in land and bring it within the provisions of the Registration Act. The covenant of title will not necessarily be implied in such cases, unless it is one of the transactions in which the covenant can be implied under the Transfer of Property Act. *Seeni Chettiar* v. *Santhanathan Chettiar, I. L. R. 20 Mad. 58*, followed. MAMIKUTTI v. PUZAKKAL EDOM (1906).

I. L. R. 29 Mad. 353

——— **s. 55 (5) (d)**—*Requisites of a valid acknowledgment—Where no contract to the contrary liability to pay public charges attaches to vendee on the passing of property—Condition precedent to liability.*—Under s. 55 (5) (d) of the Transfer of Property Act, the liability of the vendee to pay the public charges on the property sold attaches in the absence of a contract to the contrary, as an incident of the transfer and is complete when the property passes. Where the adjustment of matters, which form part, but are not the essence and substance of the contract, cannot be carried out in the mode contemplated, the Court will do whatever may be right and proper to effect such an adjustment itself. *Dinham* v. *Bradford, L. R. 5 Ch. App. 519*, referred to. Where a deed of sale provides that the vendee shall pay "the amount due, as per sub-division of the peshkush due to Government" and the deed contains no other words to show that the sub-division was a pre-requisite to the vendees liability, the mere use of the words *as per sub-division* does not make it such and, where no sub-division is effected and the vendor pays the whole peshkush, the Court will ascertain, as between the vendor and vendee, the proportion payable by the latter and direct payment thereof. An acknowledgment of a conditional liability will not, under s. 19 of the Limitation Act, give a fresh start as long as the condition remains unfulfilled. There must be an unqualified admission or an admission qualified by a condition, which is fulfilled. ARUNACHELLA ROW v. RANGIA APPA ROW (1906).

I. L. R. 29 Mad. 519

——— **s. 58**—*Mortgage by conditional sale—Whether sale or mortgage to be ascertained from whose instrument—Transfer of interest need not be in express terms—"Meddatu Krayam" meaning of*—The question whether a document operates as a mortgage, or as a conditional sale must be determined

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on a consideration of the whole document. The mere description of the document as "Meddatu Krayam" is not conclusive. The transfer of interest necessary to create a mortgage need not be in express terms. It is sufficient if the instrument taken as a whole operates to create such a transfer. KOLA VENKATANARAYANA *v.* VUPALA RATNAM (1906).

I. L. R. 29 Mad. 531

——— **ss. 58, 59.**

See MORTGAGE . **10 C. W. N. 276**

——— **ss. 58, 59, 100.**

See LANDLORD AND TENANT.

I. L. R. 33 Calc. 985

——— **s. 59**—*Deposit of title deeds—Equitable mortgage—Subsequent legal mortgage—Priority—Registration Act (III of 1877), ss. 17 and 48—Whether equitable sub-mortgage requires registration.*—*R* executed mortgages in favour of *D* some time before June, 1893. On the 3rd June, 1893, *D* deposited these mortgage-deeds with *G*'s agent in Calcutta as security for his debt to *G*. On the 19th June, 1893, *D* wrote a letter to *G*'s agent which, after reciting the amount of the debt, contained amongst others the following clause:—"That I shall pay him one-fourth of R70,000 within a fortnight, one-fourth by promissory note payable six months from date, and the remaining half by a promissory note payable within a year. In the meantime and until payment of the claim in full of Raja Gokul Dass (*G*) you will hold as agent for him the mortgage *kistbandi* dated 25th Falgoon, 1292, executed in my favour by Babu Bagabatty Charan Roy and others as enumerated below, which I have already made over to you as such agent as aforesaid as security for the due payment of the said debt, not to be parted with by you without mutual consent of myself and Raja Gokul Dass, or under an order of Court" *Held*, that the mortgage was concluded on the day when the deeds were deposited with *G*'s agent in Calcutta, and that under s. 59 of the Transfer of Property Act a valid equitable sub-mortgage was created in favour of *G* on that day. *Kadar Nath Dutt* v. *Sham Lal Khettry, 20 W. R. 150*, referred to Upon a suit by the equitable sub-mortgagee (*G*) to enforce his mortgage against the original mortgagor *R* and a subsequent mortgagee, the defence was that the alleged equitable mortgage, which was created by a letter, not being registered under s. 17 of the Registration Act, had no validity at all; and that it could not have priority over the subsequent legal mortgage. *Held*, that a deposit of title-deeds of certain property under a verbal arrangement to secure payment of a debt was not an oral agreement or declaration relating to such property within the meaning of s. 48 of the Registration Act, but the transaction was a valid equitable mortgage within the meaning of s. 59 of the Transfer of Property Act, and it did not require registration. *Coggan* v. *Pogose, I. L. R. 11 Calc. 158*, followed. *Held*, further, that in India there is no such distinction between legal and equitable estates as is known in England, and if the claim of the subsequent legal mortgagee can be sustained, it can only be sustained under s. 48 of the Registration Act. *Webb* v. *Macpherson, I. L. R. 31 Calc. 57*, referred to. GOKUL DASS *v.* EASTERN MORTGAGE AND AGENCY COMPANY (1905).

I. L. R. 33 Calc. 410

——— **s. 59.**

See ATTESTATION . **I. L. R. 33 Calc. 831**

——— **s. 60**—*Mortgage—Effect of mortgagee purchasing part of the mortgaged property—Redemption.*—Where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage money, but he cannot compel the mortgagee to allow him to redeem the shares of other persons, in which he is not interested. *Kuray Mal* v. *Puran Mal, I. L. R. 2 All. 665*, followed. *Lachmi Narain* v. *Muhammad Yusuf, I. L. R. 17 All. 63*, referred to. *Mora Joshi* v. *Ramchandra Dinkar Joshi, I. L. R. 15 Bom. 24*, distinguished. KALLAN KHAN v. MARDAN KHAN (1905).

I. L. R. 28 All. 155

——— **s. 60**—*Mortgage—Purchase of part of the mortgaged property—Mortgage foreclosed, purchaser not being made a party—Right of purchaser to redeem part of the mortgaged property.*—The plaintiff's father purchased some sir land, which, along with other property, was the subject of a mortgage by conditional sale. The mortgagees subsequently instituted a suit for foreclosure, in which they obtained a decree and an order absolute for foreclosure. But the mortgagees, although they had notice of his interest in the mortgaged property, did not join the purchaser as a party to their suit. *Held*, that there was no bar to the plaintiff's suing to redeem that portion of the mortgaged property in which their father had acquired an interest, and that they were not bound to redeem the whole mortgage. BRIJ KISHORE *v.* MADHO SINGH (1905).

I. L. R. 28 All. 279

——— **ss. 67, 99**—*Decree—Setting aside sale—Void sale—Civil Procedure Code (Act XIV of 1882), s. 244—Mortgage—Sale of mortgaged property—Money decree.*—A sale in contravention of the provisions of s. 99 of the Transfer of Property Act is void, although a third party is the purchaser and only a portion of the property was under mortgage, the sale being of the whole undivided property. *Sheodeni Tewari* v. *Ram Saran Singh, I. L. R. 26 Calc. 164*, and *Shib Dass Dass* v. *Kali Kumar Roy, I. L. R. 30 Calc. 463*, referred to. Such a sale may be set aside under s. 244 of the Code of Civil Procedure. *Mayan Pathuti* v. *Pakuran, I. L. R. 22 Mad. 347*, followed. SONU SINGH *v.* BEHARI SINGH (1905) . . **I. L. R. 33 Calc. 283**

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——— s. 68 (b)—*Holder of unregistered mortgage deprived of his security by subsequent registered sale to third party can sue under s. 68 (b) of the Transfer of Property Act—The section applies even when there is a covenant to pay—Notice of prior unregistered mortgage effect of.*—Where the owner of properties, after having mortgaged them under an unregistered deed, sells them for valuable consideration by registered deed to one, who has no notice of the mortgage, the mortgagee is deprived of his security by the wrongful act of his mortgagor and is entitled to sue the mortgagor for his money under s. 68 (*b*) of the Transfer of Property Act. Such right exists independently of, and is not taken away by, any covenant to repay contained in the mortgage deed. The purchaser under a registered sale-deed has no priority over a prior unregistered mortgage, of which he has notice. APPASAMI THEVAN *v.* VIRAPPA THEVAN (1906).

I. L. R. 29 Mad. 362

——— ss. 70, 111, cl. (d).

See MERGER . **I. L. R. 33 Calc. 1212**

——— s. 72—*Mortgage—Redemption of part—Whole burden on remainder—Purchase by mortgagee of portion of mortgaged property—Enhancement of Government revenue—Compensation for improvements.* *G.*, the predecessor in title of the plaintiffs, mortgaged Kachaura to *N. K.*, the predecessor of the defendant, and subsequently mortgaged 11 biswas of Kachaura and 6 biswas of Agrana to *N. K.* *N. K.* obtained a decree on the first mortgage and purchased the whole of Kachaura. The plaintiffs acquired from *G.* the equity of redemption in 5 biswas of Agrana and brought the suit, out of which these two appeals arose, to redeem this 5½ biswa share on payment of a proportionate amount of the mortgage money and to recover surplus profits, if any. The parties submitted to the decision of the Lower Courts that the plaintiffs must redeem the whole 6 biswa share *Held*, in S. A. 265 of 1904 that the answer to the question whether the defendant mortgagee could throw the whole burden of the second mortgage on the remainder of the mortgaged property depended on the circumstances under which his purchase was made. If two persons jointly mortgaged property to a third person, who subsequently purchased the equity of redemption from one of them, he could not throw the whole burden of his mortgage on the other. But in this case the purchase was made at an open sale and not subject to any charge, and the defendant could throw the whole burden on the remaining property. The second mortgage further contained clauses (*a*) that if the Government revenue was enhanced the mortgagor was to be liable for the amount of the enhancement, (*b*) that if the mortgagee spent any money in the construction of wells the mortgagor would refund him the amount at the time of redemption. *Held* in S.A. 298 of 1904 (*a*) that the defendant mortgagee, having paid enhanced revenue to save the property, upon failure by the mortgagor, was entitled to receive from the plaintiff the whole amount of the enhancement with interest. *Girdhari Lal v. Bhola Nath, I. L. R. 16 All. 611 at p. 614*, referred to. (*b*) That the defendant mortgagee having himself acquired the property in Kachaura could not recover the money spent in constructing wells in Kachaura. BOHRA THAKUR DAS *v.* COLLECTOR OF ALIGARH (1906).

I. L. R. 28 All. 593

——— s. 73.

See MORTGAGE . **I. L. R. 33 Calc. 87**

——— s. 73—*Sale of mortgaged property under a decree for rent—Mortgagee's charge on surplus sale-proceeds—Bengal Tenancy Act (VIII of 1885), ss. 159, 161, 162, 163, 164, 165, 166, 167.*—When mortgaged property is sold under a decree in a rent suit, the mortgagee would have, under the provisions of s. 73 of the Transfer of Property Act, a charge on the surplus sale-proceeds whether under the decree in the rent suit the property was put up for sale with power to the purchaser to avoid encumbrances or not. Ss. 159 and 161 to 167 of the Bengal Tenancy Act cannot prejudice the right of a mortgagee in that respect. GOBIND SAHAY *v.* SIBBUTRAM (1906) . **I. L. R. 33 Calc. 878**

——— s. 83—*Money deposited under becomes property of mortgage only when conditions stated in section complied with.*—Money deposited in Court by the mortgagor for payment to the mortgagee under s. 83 of the Transfer of Property Act does not become the property of the latter, until he has complied with the conditions prescribed by the section as conditions precedent to his drawing the money out of Court. *Dal Singh v. Pitam Singh, I. L. R. 125 All. 179*, followed. MOTHIAR MIRA TARAGAN *v.* AHMATTI AHMED PILLAI (1905).

I. L. R. 29 Mad. 232

——— s. 85—*Does not authorise Court to introduce unnecessary complications—Mortgagee not compellable to distribute liability among mortgaged properties—Contribution, right of, against properties not included in suit—Marshalling not compellable so as to prejudice mortgagee—Power of Court executing mortgage decree.*—There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. *Timmappa v. Lakshmamma, I. L. R. 5 Mad. 385*, referred to. He may, however, be compelled to do so when by his act he has prejudicially affected the rights of the holders of the properties to contribution among themselves. Where some only have been compelled to pay the whole debt, they are entitled to contribution from the other parties, who are liable, though the properties in their hands have not been included in their suit. *Jagat Narain v. Qutub Husain, I. L. R. 2 All. 807*, followed. *Chagandas v. Gansing, I. L. R. 20 Bom. 615*, followed. *Semble*: Where, however the mortgagor sells not merely the equity of redemption, but conveys a portion of the property itself free from any liability to contribute to the mortgage debt, the

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purchaser may insist upon the mortgagee proceeding, in the first instance, against the property in the hands of the mortgagor. Marshalling cannot be enforced so as to compel a mortgagee to proceed against a security, which may be insufficient or may involve him in litigation to realise. *Flint* v. *Howard, L. R. (1893) 2 Ch. D. 54,* distinguished. *Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry, I. L. R. 9 Calc. 406,* distinguished. *Obiter*: It is competent to the Court in executing a mortgage decree to exercise its control in bringing the different items of property comprised in the decree to sale in a particular order to adjust the equities of the parties before it, who are interested. KRISHNA AYYAR v. MUTHUKUMARASAWMIYA PILLAI (1905).

I. L. R. 29 Mad. 217

——— **s. 85.**

See PARTIES . **I. L. R. 33 Calc. 425**

——— **ss. 85, 96**—*Mortgage decree need not reserve rights admitted by all parties—Decree must be construed with reference to pleadings.*—There is nothing in the provisions of the Transfer of Property Act, which requires that a decree in a mortgage suit should in terms reserve rights admitted by all the parties and order the sale to be subject to them and s. 96 of the Act does not militate against this view. *Quære*, whether s. 85 of the Act requires such persons, whose rights are admitted, to be made parties. Where the decree omits to reserve such rights, it ought to be construed with reference to the admissions contained in the pleadings or made in the course of the case and onght not to be so construed as to grant a larger measure of relief than is prayed for or to negative rights admitted by all parties. SRINIVASA RAO SAHEB v. YAMUNABHAI AMMALL (1905) . . . . **I. L. R. 29 Mad. 84**

——— **s. 85**—*Parties to suit—Suit for foreclosure—Exemption of part of the mortgaged property—Persons interested only in the portion exempted not necessary parties.*—If a plaintiff (mortgagee), suing on the basis of his mortgage for either sale or foreclosure, thinks fit to exempt from his suit some portion of the mortgaged property and to sell or to foreclose the mortgage in respect of the remainder, there is nothing in law to prevent his doing so. If such a plaintiff exempts a portion of the mortgaged property from his suit, he is not obliged to make parties to the suit the persons interested in the portion of the property so exempted. *Chandika Singh* v. *Pokhar Singh, I. L. R. 2 All. 906,* distinguished. *Sheo Prasad* v. *Bihari Lal, I. L. R. 25 All. 79, Jai Gobind* v. *Jasram, Weekly Notes, 1898, 120,* and *Nazir Husain* v. *Nihal Chand, Weekly Notes, 1905, 156,* referred to. SHEO TAHAL OJHA v. SHEODAN RAI (1905).

I. L. R. 28 All. 174

——— **ss. 88 and 89**—*Construction of decree—Decree for sale on a mortgage—Interest after date fixed by decree for payment of the mortgage money—Power of Court to allow interest.*—In a decree under s. 88 of the Transfer of Property Act (IV of 1882) for sale of mortgaged property, the Court has power to allow interest beyond the date fixed by the decree for payment of the mortgage money. Interest may be awarded up to the realization of the money. *Maharaja of Bharatpur* v. *Rani Kasno Dei, L. R. 28 I. A. 85, I. L. R. 23 All. 18,* followed. BALWANT SINGH v. AMOLAK RAM (1905).

I. L. R. 28 All. 223

——— **ss. 88 and 89**—*Execution of decree—Decree for sale on a mortgage—Civil Procedure Code, s. 248—Decree made absolute without notice being served under s. 248—Validity of decree.*—So long as an order under s. 89 making absolute a decree for sale under s. 88 of the Transfer of Property Act, 1882, subsists, it is enforceable, and its operation cannot be impugned. If for any reason the order under s. 89 is defective, the remedy of the judgment-debtor is to get it set aside in accordance with law, but, until it is set aside, the decree, which it makes absolute, is capable of enforcement, and its validity cannot be questioned in execution proceedings. *Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All. 278, Imam-un-nissa Bibi* v. *Liakat Husain, I. L. R. 8 All. 424,* and *Sahdeo Pandey* v. *Ghasiram Gyawal, I. L. R. 21 Calc. 19,* distinguished. *Quære*, whether non-compliance with the provisions of s. 248 of the Code of Civil Procedure is anything more than a mere irregularity? *Tasadduk Rasul Khan* v. *Ahmad Husain, I. L. R. 21 Calc. 66,* referred to. RAM JAS v. SHEO PRASAD (1905) . **I. L. R. 28 All. 193**

——— **ss. 88, 89 and 90**—*Decree for sale—Sale partly in India and partly in England—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 178*—A mortgagee obtained a decree under s. 88 of the Transfer of Property Act for sale of all the property included in the mortgage, and in pursuance of the decree some of the mortgaged property was sold in India, and, at the request of the mortgagor, to enable a better price to be obtained, some of it was subsequently sold in England. The mortgagee then applied for a decree under s. 90. *Held*, that the sale which took place in England must be treated as a sale had in connection with the decree passed in this country, and that the defendants appellants could not be heard to say that the property ordered to be sold was not exhausted by proceedings under s. 89, and that a decree could be passed under s. 90. *Muhammad Akbar* v. *Munshi Ram, Weekly Notes, 1899, p. 208,* and *Badri Das* v. *Inayat Khan, I. L. R. 22 All. 404,* referred to. *Held*, further, that limitation must be held to run from the date of the sale in England. GAJADHAR LAL v. ALLIANCE BANK OF SIMLA.

I. L. R. 28 All. 660

——— **s. 89**—*Civil Procedure Code, s. 310A—Mortgage—Order for sale—Discharge by third party.*—Where a mortgage debt, for the payment of which a sale has been ordered, is satisfied by a third party, who obtains a security for the advance made by him, such security is hot extinguished by s. 89 of the Transfer of Property Act, and the incum-

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brance, in respect of which the sale was ordered, enures for the benefit of the party making the payment. *Quære*, whether s. 310A is applicable to a sale carried out under the provisions of s. 89 of the Transfer of Property Act. *Bibijan Bibi* v. *Sachi Bewa, I. L. R. 31 Calc. 563, Vanmikaling Mudali* v. *Chidambara Chetty, I. L. R. 29 Mad. 37*, and *Tufail Batma* v. *Fitola, I. L. R. 27 All. 400*, referred to. SHIAM LAL v. BASHIR-UD-DIN. **I. L. R. 28 All. 778**

——— s. 89—*Effect of order absolute for sale—Mortgagee, paying prior incumbrancer after sale, right of.*—It is settled law that, in the absence of clear proof to the contrary, it is to be taken that when the money of a person interested in immoveable property, as for instance, the owner of the equity of redemption or a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it; and this rule will apply in favour of a person who, after the sale of the properties in execution of a decree on the anterior mortgage, advances money on the security of such properties to enable the judgment-debtor to set aside such a sale under s. 310A of the Code of Civil Procedure. *Gokal Das Gopaldas* v. *Purammal Premsukhdas, I. L. R. 10 Calc. 1035*, referred to and followed. The provisions of s. 89 of the Transfer of Property Act have reference to the execution of a mortgage decree and ought not, in reason, to be so construed as to render the application of this principle impossible in cases where an order absolute for sale had been made on the ground that such order extinguished the security. *Dinobundhu Shaw Chowdhry* v. *Jogmaya Das, L. R. 29 I. A.*, referred to and followed in principle. VANMIKALINGA MUDALI v. CHIDAMBARA CHETTY (1906) . . . . **I. L. R. 29 Mad. 37**

——— ss. 89, 90—*Mortgage—Release of portion of mortgaged property—Mortgagee's right to release—Personal decree against mortgagor.*—The sale contemplated by s. 89 of the Transfer of Property Act is the sale of the whole or of a sufficient portion of the mortgaged property. A personal decree under s. 90 of the Transfer of Property Act can only be made, where the net proceeds of the sale under s. 89 are insufficient to pay the amount due on the mortgage. A mortgagee may release a portion of the mortgaged property from the debt, but he cannot by doing so impose upon the mortgagor a personal liability, to which otherwise he would not be subject. Where the mortgagee released substantial portions of the mortgaged property and the purchasers of those portions from the mortgage debt, there being no consent or acquiescence on the part of the mortgagor, and there being nothing to show that the amount, which the purchasers paid to the mortgagee was the full and true value of the property, which they purchased, *Held*, that the mortgagor was entitled to claim to have the mortgaged property sold before a decree could be passed against him under s. 90. *Sheo Prasad* v. *Behari Lal, I. L. R. 25 All. 79*, dissented from. RAM RANJAN CHAKRAVARTI v. INDRA NARAIN DAS (1906) . **I. L. R. 33 Calc. 890**
s.c. 10 C. W. N. 862

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——— s. 85.

See MORTGAGE . **10 C. W. N. 55**

——— 89—*Refusing to make order absolute for sale—Ground for—Appeal from preliminary decree, pendency of—Time, extension of.*—The pendency of an appeal against a decree under s. 88 of the Transfer of Property Act is of itself no ground for refusing to make an order absolute for sale under s. 89 of the Act. A Court has no power, of its own motion, to extend the time provided in s. 89 for making an order absolute. RAM GOLAM LAL SAHU v. CHOWDHRY BABU BARSATI SINGH (1902) . . . . **10 C. W. N. 910**

——— ss. 89 and 90—*Execution of decree—Mortgage—Order absolute for sale of part only of the mortgaged property—Property sold insufficient to satisfy the mortgage debt—Application for personal decree against mortgagor.*—A mortgagee in a suit for sale of the mortgaged property obtained a decree for sale of the whole: but when applying subsequently for an order absolute for sale relinquished his claim as against part of the mortgaged property and took an order for sale of part only, and that order became final. The property ordered to be sold was brought to sale, but realized an amount insufficient to satisfy the decree. *Held*, that the decree-holder was under these circumstances competent to apply for and obtain a personal decree against the mortgagor under s. 90 of the Transfer of Property Act, 1882. *Sheo Prasad* v. *Behari Lal, I. L. R. 25 All. 79*, followed. GHAFUR HASAN v. KIFAYAT-ULLAH KHAN (1905). **I. L. R. 28 All. 19**

——— s. 90—*Limitation—Decree, execution of—Mortgage decree—Limitation Act (XV of 1877), Sch. II, Art. 179, cl. 4—Personal decree—Applying in accordance with law—Application which Court is not competent to grant.*—An application for a decree under s. 90 of the Transfer of Property Act cannot be regarded as an application for the execution of the decree for sale or as an application to the Court to take some step in aid of execution of that decree within the meaning of Art. 179, cl. 4 of the second Schedule of the Limitation Act. An application, which the Court was not competent to grant, is not one in accordance with law within the meaning of Art. 179, cl. 4, Sch II, of the Limitation Act. *Per* MOOKERJEE, *J.* An application for execution of a decree made under s. 90 of the Transfer of Property Act cannot save from limitation an application for execution of the decree for sale. *Lalla Tirhini Sahai* v. *Lalla Hurruk Narain, I. L. R. 21 Calc. 26. Dina Nath Mitter* v. *Bejoy Krishna Das, 7 C. W. N. 744*, referred to. *Durga Dai* v. *Bhagwat Prasad, I. L. R. 13 All. 356*, and *Ram Sarup* v. *Ghaurrani, I. L. R. 21*

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

All. 453, dissented from. *Munawar Hussain* v. *Jani Bejai Shankar, I. L. R. 27 All. 619*, followed. PURNA CHANDRA MANDAL *v.* RADHA NATH DASS (1906) . . . . **I. L. R. 33 Calc. 867**

——— **s. 90**—*"Proceeds of any such sale."*—In a suit for sale on a mortgage the property sold was described in the decree and order under ss. 88 and 89 of the Transfer of Property Act as *haq zemindari*, whereas the property actually mortgaged comprised only *malikana* rights. The plaintiff claimed a personal decree under the terms of the mortgage. *Held*, that the words "such sale" in s. 90 of the Transfer of Property Act mean a sale of the property directed to be sold by the decree under s. 88 and the order under s. 89, and that the decree-holder was entitled to a decree under s. 90. *Sheo Prasad* v. *Behari Lall, I. L. R. 25 All. 79*, followed. SHIAM SUNDAR LAL *v.* GANESH PRASAD (1906) . **I. L. R. 28 All. 674**

——— **s. 90.**

See CIVIL PROCEDURE CODE.

——— **ss. 90, 100**—*Suit to enforce vendor's lien by sale—Determination in that suit of vendee's personal liability—Application for decree under s. 90—Res judicata.*—In a suit for enforcement of a vendor's lien by sale of the property the Court decided that "the defendants cannot, either personally or in their other properties, be held liable for any part of the amount claimed. The property sold to them can alone be liable." Subsequently the plaintiffs applied for a decree under s. 90 of the Transfer of Property Act, 1882. *Held*, it was within the competence of the Court to determine the personal liability or otherwise of the defendants at the stage at which it decided it, and that the matter so determined was *res judicata* in respect of their subsequent application. *Musaheb Zaman Khan* v. *Inayat-ullah, I. L. R. 14 All. 513. Raj Singh* v. *Parmanand, I. L. R. 11 All. 486, Durga Dai* v. *Bhagwat Prasad, I. L. R. 13 All. 356, Miller* v. *Digambari Debya, Weekly Notes, 1890, p. 142*, referred to, and it was none the less *res judicata* because the finding as to the personal liability of the defendants was not embodied in the decree. *Jamait-un-nissa* v. *Lutf-un-nissa I. L. R. 7 All. 606*, referred to. UTTAM ISHLOK RAI *v.* RAM NARAIN RAI (1906). **I. L. R. 28 All. 365**

——— **s. 95**—*Joint mortgage bond in ordinary form—Payment by one mortgagor and redemption of whole property mortgaged—Charge on property of co-mortgagors—Failure of plaintiff in suit for money paid on mortgage to prove that he executed bond as surety only—Right to contribution—Pleadings—Relief.*—The fact that a plaintiff has claimed too much on one cause of action does not preclude him from recovering what he is actually entitled to on another cause of action, provided the pleadings are wide enough to cover such a claim. The construction of s. 95 of the Transfer of Property Act (IV of 1882) should not limit its operation to mortgages under which possession passes, and therefore on redemption properly repasses: the better way is to construe it distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow on redemption. To raise funds for the defence of a relative the plaintiff and defendants jointly executed a bond in the ordinary form, each pledging immovable property as security. The plaintiff eventually paid off the amount due on the bond and redeemed all the property mortgaged. In a suit, in which he claimed the whole sum paid by him on the ground that he had executed the bond only as a surety, the defendant denied that he was a surety and pleaded that he was only entitled to a rateable amount from each of them. *Held*, that the plaintiff's failure to prove that he was merely a surety on the bond did not preclude him from recovering a proportionate share from each of the defendants; and that under s. 95 of the Transfer of Property Act, he was entitled also to a charge for such amount on the defendants' interests in the property respectively mortgaged by them. AHMAD WALI KHAN *v.* SHAMSH-UL JAHAN BEGAM (1905). **I. L. R. 28 All. 482**
s.c. L. R. 33 I. A. 81
10 C. W. N. 628

——— **s. 99.**

See SALE FOR ARREARS OF RENT.
I. L. R. 33 Calc. 11

——— **s. 99**—*Mortgage—Suit for sale on a mortgage—Compromise resulting in a money decree—Mortgagee not competent to sell mortgaged property in execution of such decree.*—A mortgagee brought a suit for sale on his mortgage. The suit was compromised, and the mortgagee took a money decree, in which, however, the property originally hypothecated to him was set out as being charged. *Held*, that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of his decree, but, if he wished to do so, he would have to institute a suit under s. 67 of the Transfer of Property Act on the decree. *Aubhoyessury Dabee* v. *Gouri Sunkur Panday, I. L. R. 22 Calc. 859*, followed. HEM BAN *v.* BEHARI GIR (1905) . . . **I. L. R. 28 All. 58**

——— **s. 99**—*Not merely declaratory of old Law—Purchase by mortgagee of equity of redemption in execution of decree not based on mortgage—Effect of on the rights of sons of mortgagor.*—S. 99 of the Transfer of Property Act is not merely declaratory of what was accepted and enforced as law before the passing of the Act and effect ought not to be given to the new restrictions imposed by that section so as to give them retrospective operation. *Muthuraman Chetty* v. *Ettappasami, I. L. R. 22 Mad. 372*, distinguished. When the mortgagee, at a Court sale perfected before the passing of the Act, and brought about in respect of a claim independent of

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

the mortgage, purchases the right of redemption in the mortgaged property, such purchase passes to him the whole interest as effectually against the sons of the judgment-debtor as against the judgment-debtor himself and the sons cannot sue to redeem the property so sold or their share therein. NANNUVIEN *v.* MUTHUSAMI DIKSHADAR (1905). **I. L. R. 29 Mad. 421**

——— **s. 99**—*Rights of purchaser—Landlord having a mortgage of the holding*—The sale of a holding in execution of a decree for rent obtained by a landlord, who also held a mortgage of the holding, is void, and the purchaser at the sale acquires no title against another mortgagee of the holding, who has purchased it under a decree on his mortgage. *Sheodeni Tewari* v. *Ram Saran Singh, I. L. R. 26 Calc. 164,* followed. BASIRUDDIN *v.* KAILAS KAMINI DEBI (1905) . **I. L. R. 33 Calc. 113**

——— **ss. 99, 67**—*Holder of usufructuary mortgage attaching mortgaged property for a decree on an independent claim may sue under s. 67 on the mortgage.*—Where a usufructuary mortgagee, who had no right to sue for his mortgage amount, obtained a decree against the mortgagor on a claim independent of the mortgage and in execution of such decree attached the interest of the mortgagor in the mortgaged properties: *Held,* that he was entitled under the provisions of s. 99 of the Transfer of Property Act to bring a suit on his mortgage under s. 67 of the Act. The decree in such a suit should be one for the sale of the property free from the mortgage claim and for the application of the sale-proceeds in satisfaction of the mortgages on the property, the balance, if any, to be applied towards the claim under attachment. GOVINDA BHATTA *v.* NARAIN BHATTA (1906) . . . **I. L. R. 29 Mad. 424**

——— **ss. 106, 111.**

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 339

——— **s. 108, cl. (c).**

See LEASE . **I. L. R. 33 Calc. 203**

——— **ss. 108 (o), 117.**

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 54

——— **s. 123.**

See ASSIGNMENT **10 C. W. N. 717, 755**

See HINDU LAW—MAINTENANCE.
10 C. W. N. 1074

——— **s. 123**—*Registration Act (II of 1887), 35—Gift, if must be registered by donor—Death of donor—Admission of execution by representative—Gift to wife—Admission by wife.*—It is not necessary for the validity of a deed of gift that it should be registered by the donor himself. Where a Hindu executed a deed of gift in favour of his wife and died and the deed was subsequently registered at the instance of the widow;

TRANSFER OF PROPERTY ACT (IV OF 1882)—*concluded.*

Held, that it was a valid deed of gift within the provisions of s. 123 of the Transfer of Property Act. The widow being entitled in the circumstances of the case to letters of administration to the estate of the donor, was *prima facie* qualified to admit execution of the document as his "representative" within the meaning of s. 35 of the Registration Act, the fact that she herself was the donee under the document being immaterial. *Nand Kishore Lal* v. *Suraj Prosad, I. L. R. 20 All. 392,* and *Pokran* v. *Kunhammed, I. L. R. 23 Mad. 580,* referred to. BHABATOSH BANERJEE *v.* SHAIKH SOLEMAN (1906) . . . . . **10 C. W. N. 717**
s.c. **I. L. R. 33 Calc. 584**

TRANSFER OF SUIT.

——— *Civil cases—Power of High Court to remove suit from Court of Political Resident at Aden—Letters Patent of High Court, 1865, cl. 13—Superintendence of High Court—Charter Act (24 and 25 Vict., c. 104), s. 15—Aden Courts' Act (II of 1864).*—The Civil Court of the Political Resident at Aden as constituted by the Aden Courts' Act (II of 1864), is subject to the superintendence of the High Court at Bombay within the meaning of cl. 13 of the amended Letters Patent, 1865; and that High Court has power to remove a suit from that Court to itself for trial and determination. MUNICIPAL OFFICER, ADEN, *v.* ISMAIL HAJEE (1905).
I. L. R. 30 Bom. 246
s.c. **L. R. 33 I. A. 30**

TRUST ACT (II OF 1882).

See HINDU LAW.
L. R. 28 I. A. 30

——— **s. 20.**

See GUARDIAN AND WARDS ACT.
I. L. R. 33 Calc. 591

——— **s. 48**—*No right to recover even where unlawful agreement only partly carried out—Decision not bad, although no distinct issue when parties not taken by surprise.*—The rule that a person *in pari delicto* cannot recover, is applicable not only where the unlawful agreement had been fully carried out, but also where there has been part performance of a substantial character of such agreement. This is the construction which ought to be placed on the words 'not carried into execution' in s. 84 of the Indian Trusts Act. Where a point, on which there is no distinct issue, is present to the minds of the parties, the decision on such point cannot be impeached on the ground that there was no issue raised. MUTHURAMAN CHETTY *v.* KRISHNA PILLAI (1905) . . . **I. L. R. 29 Mad. 72**

——— **s. 91.**

See TRANSFER OF PROPERTY ACT, s. 40.

TRUST, CONSTRUCTIVE.

See CIVIL PROCEDURE CODE.
10 C. W. N. 866

See DEBUTTER 10 C. W. N. 738, 1000

See ESTOPPEL . . 10 C. W. N. 747

TRUSTEE.

See NATIVE STATES.
I. L. R. 30 Bom. 578

——— *Person not entitled obtaining renewal of a promissory note, trustee for rightful owner—Misjoinder of parties.*—Where on the death of the payee of a promissory note executed by *D*, *C* becomes entitled to the amount, but *A* obtains a renewal from *D* in favour of *B*, a suit will lie by *C* against *D*, *A* and *B* as defendants to recover on the renewed note, as *A* and *B* in obtaining the renewal must be held in law to have become trustees for *C*. *A* and *B* are necessary parties and the suit will not be bad for misjoinder. The only person entitled to object to *C*'s claim will be *D*. RAMAKRISHNA RAJU *v.* KATTA VENKATASWAMY (1905).
I. L. R. 29 Mad. 87

———*Consent decree that new trustee be appointed by the Court—Preference to lineal descendants of settlor—Discretion—Appointment of a stranger to the line*—Where a consent decree had been passed directing that the first respondent should retire from the Trusteeship, a Mahomedan Shiah religious endowment and that a new trustee be appointed in his place by the Chief Court of Lower Burma, preference in such appointment being given to the lineal descendants of the settlor, *Held*, that under this decree the Chief Court had a discretion to exercise in the selection of a trustee, that the appellant, as senior in order of the settlor's children, had no absolute right to be appointed in the absence of disqualification, and that the Chief Court rightly exercised its discretion in appointing a Shiah resident in the neighbourhood, not a lineal descendant of the settlor, in preference to the appellant, who by reason of her sex, could at best discharge many of her duties only by deputy and as a Babu might take a less zealous interest in carrying on the religious observances of the Shiah school. SHAHOO BANOO *v.* AGA MAHOMED JAFFER BINDANEEM (1906).
L. R. 34 I. A. 46
s.c. I. L. R. 34 Calc. 118
11 C. W. N. 297

TURN OF WORSHIP.

See HINDU LAW . 10 C. W. N. 825

U

UNASCERTAINED GOODS.

See CONTRACT . I. L. R. 33 Calc. 547

UNCONSCIONABLE BARGAIN.

See DISQUALIFIED PROPRIETOR.
10 C. W. N. 849

UNDERGROUND RIGHTS.

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 54

UNDUE INFLUENCE.

See BENAMI.

See DISQUALIFIED PROPRIETOR.

——— *Gift—Suit—Benami transactions—Pardanashin lady—Suit to set aside deeds as having been executed by person of unsound mind—Alleged influence of daughter over her mother—Gift with imaginary consideration inserted in deed.*—In a suit by a son to set aside certain transactions entered into by his mother, a Mahomedan lady, in favour of her daughter, the defendant, by which the daughter acquired possession of most of her mother's property, the plaint alleged that his mother was, at the time the transactions took place, of unsound mind and entirely under the dominion and control" of her daughter. Both Courts in India found that the mother was not of unsound mind; but the first Court treated her as a *pardanashin lady* and as "entirely under the control and domination of the defendant, who had unscrupulously used her power over her mother to get her mother's property into her own hands," and made a decree that the transactions should be avoided on the ground of undue influence. The Court of appeal reversed the finding with respect to undue influence and dismissed the suit. *Held*, that, assuming the question of undue influence could be set up at all (for it was not raised in the pleadings except with regard to unsoundness of mind, which had been negatived, nor was any issue raised upon it), no case of undue influence had been established by the evidence. The mere relation of daughter to mother in itself suggested nothing in the way of special influence or control; and the evidence was insufficient to establish any general case of domination on the part of the daughter, any subjection of the mother, such as to lead to a presumption against any transaction between the two; and with regard to the actual transactions, there was no evidence whatever of undue influence brought to bear upon them. *Held*, also, that in the evidence and circumstances of the case the transactions in dispute were absolute gifts, and not *benami* transactions, which might have been set aside. ISMAIL MUSAJEE MOOKERDAM *v.* HAFIZ BOO (1906) . . . I. L. R. 33 Calc. 773
s.c. L. R. 33 I. A. 86
10 C. W. N. 570

UNITED PROVINCES LAND REVENUE ACT (III OF 1901).

See CIVIL PROCEDURE CODE.

See CONTRACT ACT.

UNITED PROVINCES LAND REVENUE ACT (III OF 1901)—*concluded.*

——— **ss. 110, 111 and 233 (k)**—*Partition—Suit for recovery of property in Civil Court—Jurisdiction.—Held,* that the prohibition contained in s. 233 *(k)* of the United Provinces Land Revenue Act, 1901, applies only to suits with respect to partitions in which the plaintiff has had an opportunity of having his objections considered under s. 111 and has not availed himself of it. KHASAY *v.* JUGLA (1906). . . **I. L. R. 28 All. 432**

——— **ss. 183 and 233.**

See ACT IX OF 1872, s. 69.

——— **s. 234**—*Lambardar and co-sharer—Remuneration of lambardar—Rules of the Board of Revenue dated 24th February, 1902, Nos. 22 and 23.—Held,* that, in the absence of any agreement between the lambardar and co-sharers as to the lambardar's remuneration, the lambardar is entitled to 5 per cent. under Rule 23 of the Board of Revenue Rules, dated February 24th, 1902, and is entitled to the benefit of this rule, although in previous years he may have received nothing. GENDA KUNWAR *v.* PIARI LAL (1906) . **I. L. R. 28 All. 693**

USUFRUCTUARY MORTGAGE.

See LANDLORD AND TENANT. **10 C. W. N. 719**

See MORTGAGE . **10 C. W. N. 266**

See TRANSFER . . **10 C. W. N. 499**

See TRANSFER OF PROPERTY ACT.

V

VACCINATOR.

See PENAL CODE.

VALUATION OF SUITS.

See CIVIL PROCEDURE CODE.

——— *Appeals—Appeal from decree making property liable for mortgage debt—Court Fees Act (VII of 1870), Sch. I, Art. 1—Value of the subject-matter in dispute—Mortgage—Form of mortgage—Creation of charge on property—Words creating simple mortgage—Paibandh—Intention of parties—Registration—Effect of registration in the wrong book—Extinguishment of mortgage by payment—Effect of payment of prior mortgage by subsequent mortgagee—Intention of parties to keep mortgage alive—Assignment of mortgage—Subrogation.*—Where the purchaser of mortgaged property being a defendant in the mortgagee's suit for foreclosure, preferred an appeal against the decree for foreclosure made in the suit, the amount found due on the mortgage being over a lakh of rupees: *Held* (for the purpose of ascertaining the Court-fee payable on the memorandum of appeal) that the value of the property affected by the decree must be taken to be Rs2,500, being the amount for which the appellant

VALUATION OF SUITS—*concluded.*

had purchased the property. *Venkappa* v. *Narasimha, I. L. R. 10 Mad. 187,* followed. By a bond, being on the face of it an ordinary bond, the obligor agreed to repay the debt and admitted that, if he failed to do so, the obligee would be entitled to recover the debt by sale of a certain factory belonging to him and from his person and other properties, and that the property referred to in the bond will be held *Paibandh* for the debt. *Held,* that the bond created no special lien on the factory, and that the circumstance that the bond was registered as an agreement in Book I and that the obligee took no steps to have it registered as a mortgage was evidence that the parties intended to treat it as an agreement rather than as a mortgage. *Najibulla Mulla* v. *Nusir Mistri, I. L. R. 7 Calc. 196,* referred to. Plaintiffs paid out of their own funds the amount due under a mortgage bond payable by five annual instalments, the first of which was due on the 15th January, 1895, and the last on the 15th January, 1899, executed by *C* on the 8th April, 1894, mortgaging his Indigo Concern and the mortgagee on the 7th November, 1899, after the payment of the last instalment, executed at *C*'s request an assignment of the mortgage in their favour. On the 21st December, 1895, *C* being indebted to the plaintiffs in a large amount recoverable only out of the produce of the factory had executed in their favour an agreement to give them a first mortgage on the concern and certain other properties, and on the 13th November, 1896, *C* executed two other deeds creating in their favour a valid charge on the said concern and certain other properties. *Held,* that, although there was no direct evidence of any formal bargain or agreement, the presumption was that the plaintiffs, when they paid off the instalments due under the mortgage of the 8th April, 1894, intended that the mortgage should be kept alive for their benefit and that in itself entitled them to come in as first mortgagee. *Held,* further, that under the agreement of the 21st December, 1895, which created an equitable mortgage, and under the two deeds of the 13th November, 1896, the plaintiffs were in the position of puisne mortgagees and when thereafter they paid off the last three instalments due to the first mortgagee, they were entitled to come in by subrogation as first mortgagee, and further that, the mortgage having been kept alive, the assignment to them under *C*'s direction gave them all the rights, which the mortgagee had. Whether a mortgage paid off has been kept alive or extinguished depends on the intention of the parties, the mere fact that it has been paid off not deciding the question. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas, I. L. R. 10 Calc. 1035: L. R. 11 I. A. 126; Dinobundhu Shaw Chowdhury* v. *Jogmaya Dasi, I. L. R. 29 Calc. 154: L. R. 29 I. A. 9; In re Wrexham, &c., Railway, 1 Ch. 440; Mohesh Lal* v. *Bawan Das, I. L. R. 9 Calc. 961: L. R. 10 I. A. 62; Tulsa* v. *Khub Chand, I. L. R. 13 All. 581,* referred to. JAGATDHAR NARAIN PRASAD *v.* BROWN (1906).

I. L. R. 33 Calc. 1133
s.c. 10 C. W. N. 1010

VALUE OF APPEAL.

See APPEAL.

VALUE OF APPEAL—*concluded.*

See CIVIL PROCEDURE CODE.
10 C. W. N. 564

VENDOR AND PURCHASER.

See ACCOUNT.
See CONTRACT . I. L. R. 33 Calc. 1

VILLAGE CHAUKIDARI ACT (BENGAL ACT VI OF 1870).

——— ss. 48, 50, 51.

See CHAUKIDARI CHAKRAN LAND.
I. L. R. 33 Calc. 596

VIS MAJOR.

See CIVIL PROCEDURE CODE.
10 C. W. N. 115

VOID BEQUEST.

See JURISDICTION OF HIGH COURT.
I. L. R. 33 Calc. 180

VRITTI.

See STRIDHAN . I. L. R. 33 Calc. 229

W

WAGERING CONTRACTS.

See CONTRACT ACT (XI OF 1872).

——— *Agreement to pay differences—Surrounding circumstances—Form of contract not of moment—Contract Act (IX of 1872), s. 30—Bombay Act III of 1865.*—The law which is contained in s. 30 of the Contract Act (IX of 1872) and in Bombay Act III of 1865, is that the Court must not only consider the terms, in which the parties have chosen to embody their agreement, but must look to the whole nature of the transaction or institution, whatever it may be, and must probe among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions, which might in certain events become operative, to compel the passing of property, though neither party anticipated such a contingency. The Court should be astute to discover what in fact was the common intention of both parties and should do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain. MOTILAL *v.* GOBINDRAM (1905) . I. L. R. 30 Bom. 83

WAJIB-UL-ARZ.

See MAHOMEDAN LAW.
I. L. R. 28 All. 499
See MORTGAGE . . 10 C. W. N. 778
See PRE-EMPTION.
I. L. R. 28 All. 60, 124, 168, 235, 237, 246, 286, 454, 456, 614, 679

——— *Declaration recorded in wajib-ul-arz—Construction of will—Document of testamentary nature as to wishes respecting the succession to property on death—Whether bequest was to person irrespective of his adoption, or whether valid adoption was a condition of inheriting the property—Regulation VII of 1892—Act XIX of 1873.*—The value as evidence, the importance as records, and the misuse by proprietors, of *wajib-ul-arzes* under Regulation VII of 1822 and Act XIX of 1873, which repealed that regulation in the North-Western Provinces, commented upon. *Lekhraj Kuar* v. *Mahpal Singh*, *L. R. 7 I. A. 63*; *I. L. R. 5 Calc. 744*, and *Uman Parshad* v. *Gandharp Singh*, *L. R. 14 I. A. 127*; *I. L. R. 5 Calc. 20*, referred to. A recital in a *wajib-ul-arz* may operate as a will (see *Mathura Das* v. *Bhikhan Mal*, *I. L. R. 19 All. 16*). The weight to be given to a statement of that nature must depend in each case on the circumstances, in which it was originally made, and the corroboration it receives from extrinsic evidence. A village proprietor in 1877 caused the following declaration to be made in the *wajib-ul-arz* of the village recorded under Act XIX of 1873—"I am the only zemindar in this village. I am a Marwari Brahman. Seven years ago I adopted my sister's son, Murli. He is my heir and successor *(Malik)*. If after this agreement, a son is born to me half the property would be received by him and half by the adopted son. If more than one son are born to me the property would be equally divided among them, including the adopted son, as brothers. I have two wives now: they will receive their maintenance from him (Murli)." The declarant died in 1885 leaving a natural-born son, who died childless in 1887. In 1896 the respondent (the "adopted son," mentioned in the declaration) brought a suit claiming to be entitled to the property therein mentioned on the strength of his adoption and also on the terms of the declaration, which he contended was a will. Under a ruling of the Privy Council in 1899, the adoption of a sister's son was held to be invalid; and both Courts in India found that a family custom, which would have validated such an adoption, was not established in this suit. The High Court held that the respondent was entitled to succeed irrespective of the adoption. *Held*, by the Judicial Committee, assuming that the *wajib-ul-arz* might be treated as a will, that the words "adopted son" in the declaration were descriptive only, and not the "reason and motive of the gift." The intention was to give him the property as an adopted son capable of inheriting by virtue of the adoption, and as his adoption was invalid by Hindu law, and not warranted by family custom, it gave him no right to inherit and the gift did not take effect. *Fanindra Deb Raikat* v. *Rajeswar Das*, *L. R. 12 I. A. 72*, *I. L*

WAJIB-UL-ARZ—*concluded.*

R. 11 Calc. 463, followed. *Bireswar Mukerjee* v. *Ardha Chander Roy*, *L. R. 19 I. A. 101*, *I. L. R. 19 Calc. 452*, and *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*, *L. R. 3 I. A. 253*, distinguished. LALI *v.* MURLIDHAR (1906).

I. L. R. 28 All. 488
s.c. L. R. 33 I. A. 97
s.c. 10 C. W. N. 730

——— *Wajib-ul-arz—Entry verified—Verifier's estate, if bound—Will.*—An entry in a *Wajib-ul-arz*, which a person has verified, cannot, by reason of verification, be regarded as his Will or as a document of a testamentary character by him. A rule of succession laid down therein cannot bind his estate after his death. SAHOODRA *v.* GANESH PRASAD (1905) . . . . . **10 C. W. N. 249**

WAKF.

See MAHOMEDAN LAW.
I. L. R. 33 Calc. 85
I. L. R. 28 All. 633

See MAMLATDARS COURTS ACT (III OF 1867.)

WAKFNAMA.

——— *Wakfnama—Suit by heir against mutwalli—Compromise—Recognition of validity of wakf by heir—Right of judgment-creditor of heir to proceed against wakf properties—Privity.*—One *D* executed a *wakfnamah* appointing *B mutwalli*. After *D*'s death his widow *M* sued to recover a share of the properties as one of *D*'s heirs. *B* set up the *wakfnamah* in defence. But the suit was compromised and a *solenamah* was executed, in which *M* admitted the genuineness and validity of the *wakfnamah* and in consideration of an annuity stipulated that neither she nor her heirs should ever in future be competent to claim any of the properties covered by the *wakfnamah*, but that if, at the instance of a third party, the *wakfnamah* should be declared invalid, the terms of the *solenamah* would not affect or interfere with her right of inheritance. Previous to the institution of the suit, *M* had borrowed moneys from the plaintiff. The plaintiff obtained a decree against *M* for the debt and having failed to execute the same against *M*'s share in the alleged *wakf* properties instituted the present suit for a declaration that he was not bound by the *wakfnamah* or the *solenamah*, and that he was entitled to proceed against *M*'s share in the properties in execution of the decree: *Held*, that the suit was maintainable as the plaintiff was not bound by the *solenamah*: and that he was entitled to show that the *wakf* was invalid and inoperative. The principle of *Srimati Anandmoyee Debi* v. *Dhirendra Chandra Mukherjee*, *8 B. L. R. 122*, followed. MUHAMMAD BUKHT *v.* AZMAN REZA (1906).

10 C. W. N. 560

WIDOW.

See HINDU LAW . **10 C. W. N. 802**
I. L. R. 33 Calc. 842, 1079

WILL.

See HINDU LAW.
I. L. R. 33 Calc. 947, 1306

See LIMITATION ACT, s. 187.
10 C. W. N. 864

See MAHOMEDAN LAW.
I. L. R. 28 All. 342, 715

See PROBATE.

See SUCCESSION ACT, s. 116.
10 C. W. N. 695

See WAJIB-UL-ARZ.
I. L. R. 28 All. 488
10 C. W. N. 249, 730

——— *Will suppressed—Void—Sale, if valid.*—A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void *ab initio* and a sale of a property of the deceased by the administrator, who has obtained a grant of an administration under such circumstances to a purchaser, who was ignorant of the suppression of the will, is valid, even where the grant is revoked after the sale. *Ellis* v. *Ellis*, *L. R. (1905) 1 Ch. 613*, referred to. *Boxall* v. *Boxall*, *27 Ch. D. 220*, followed. The defence of purchase for valuable consideration without notice is available against a claim based on an equitable title, but not against one based on a legal title. The Will in this case contained the clause "On my demise *G*, son of *P*, or any full brother of *G*, that shall be born in equal shares, shall become the owner of the share or shares left by me and until the said *G* attain majority *P* and *B*, wife of *P*, shall remain trustee, *i.e.*, guardians and next friends": *Held*, that there was neither an express nor implied appointment of executors under that clause. GOPAL DAS AGARWALLA *v.* BUDREE DASS SUREEKA (1906). . **10 C. W. N. 662**

——— *Construction—Rule against perpetuity—Succession Act (X of 1865), s. 101.*—Clause 13 of the will produced in this case was as follows:—"As to my other property, which there is, that is the property situated on the east side of the house of my step-brother, I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him my Mukhtyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years. *Held*, on a construction of the above clause, that the bequest in favour of a son of Mahadev, who might be adopted at any time after Mahadev's death by a widow, who might not have been living at the testator's decease, was void under s. 101 of the Succession Act (X of 1865). KASHINATH CHIMNAJI *v.* CHIMNAJI SADASHIV (1906) . . **I. L. R. 30 Bom. 477**

——— *Fund specified, liable for debts and expenses even when there is a residue undisposed*

WILL—*continued.*

of.—Where a will directs that the funeral and testamentary expenses should be paid out of a legacy, but makes no disposition of the residuary estate, such expenses will nevertheless be payable out of the fund specified and the fact that the testator at the time she made the will was not aware that she had a residue to dispose of, will not justify the Court in speculating upon what she would or might have done had she been aware of it, and departing from the express directions of the will, to make a new will for her. CAMANI *v.* ADMINISTRATOR-GENERAL OF MADRAS (1906) . . **I. L. R. 29 Mad. 290**

——— *Proof of will—Evidence as to due execution and registration—Property obtained—Presumption as to official acts duly performed.*—The registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, and are competent to act, and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will, unless it be shown that a deliberate fraud on him has been successfully committed, be presumed to be done duly and in order. A will propounded in this case was upheld as being genuine on the evidence as to due execution and registration, and on the other circumstances and probabilities of the case and the decree of the High Court, which had reversed that of the Subordinate Judge, was affirmed. Evidence of the general reputation of character of the identifiers in the Registration office was inadmissible to refute the *bond fides* of the transaction. GANGAMOYI DEBI *v.* TROILUCKHYA NATH CHOWDHRY, (1905) . . . **I. L. R. 33 Calc 537**
s.c. 10 C. W. N. 522
s.c. L. R. 33 I. A. 60

——— *"Such debts and liabilities as aforesaid"—"Such", meaning of—Time no part of the description.*—A will contained a clause providing.—"11. As regards the remaining one equal fourth share of the said residue I direct that, if at the time the said residue is divisible, my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust, until the said Ardeshir shall be free from such debts and liabilities or until he shall die, to apply the income of the same in or towards the maintenance and support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education or other benefit of such children including their marriage, but when and so soon as the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income, if any, to him the said Ardeshir absolutely." A question having arisen as to whether the expression "when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid" had reference only to debts and liabilities existing at the time when the residue was divisible. *Held*, that the debts and liabilities to which the clause related were debts or any liabilities likely to result in a debt or debts of more than Rupees five thousand and it was with debts of that description that a comparison was implied by the word *such*. Time was no part of their description and reference was made to time only to indicate the event on which certain consequences were to follow according as debts and liabilities of the description indicated did or did not exist. BAI JAIJI *v.* MACLEOD (1906). . **I. L. R. 30 Bom. 493**

WITHDRAWAL OF SUIT.

See CIVIL COURTS ACT, ss. 22, 23.
10 C. W. N. 902

See CIVIL PROCEDURE CODE.
10 C. W. N. 8

WORDS AND PHRASES.

——— **"Cause of action," meaning of.**

See LETTERS PATENT.

——— **"City of Bombay," limits of.**

See BOMBAY MUNICIPAL ACT.

——— **"Disturbance," meaning of.**

See EASEMENTS ACT.

——— **"Immediately," meaning of.**

See LAND ACQUISITION ACT.

——— **"Legally recoverable," meaning of.**

See CIVIL PROCEDURE CODE.

——— **"Notice," meaning of.**

See LAND ACQUISITION ACT.

——— **"Physical comfort," meaning of.**

See EASEMENTS ACT.

——— **"Public place," meaning of.**

See GAMBLING.

——— **"Street," construction of.**

See BOMBAY MUNICIPAL ACT.

WRONGFUL GAIN.

See CHEATING . **I. L. R. 33 Calc. 50**

WRONGFUL LOSS.

See CHEATING . **I. L. R. 33 Calc. 50**

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ZEMINDAR.

See CHOWKIDARI CHAKRAN ACT, s. 48.
10 C. W. N. 637

ZURIPESHGI LEASE.

See BENGAL REGULATION VIII OF 1819.
See BENGAL TENANCY ACT.
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